

THE
INDIAN COMPANIES ACT, 1882

(ACT VI OF 1882)

(WITH THE CASE-LAW THEREON)

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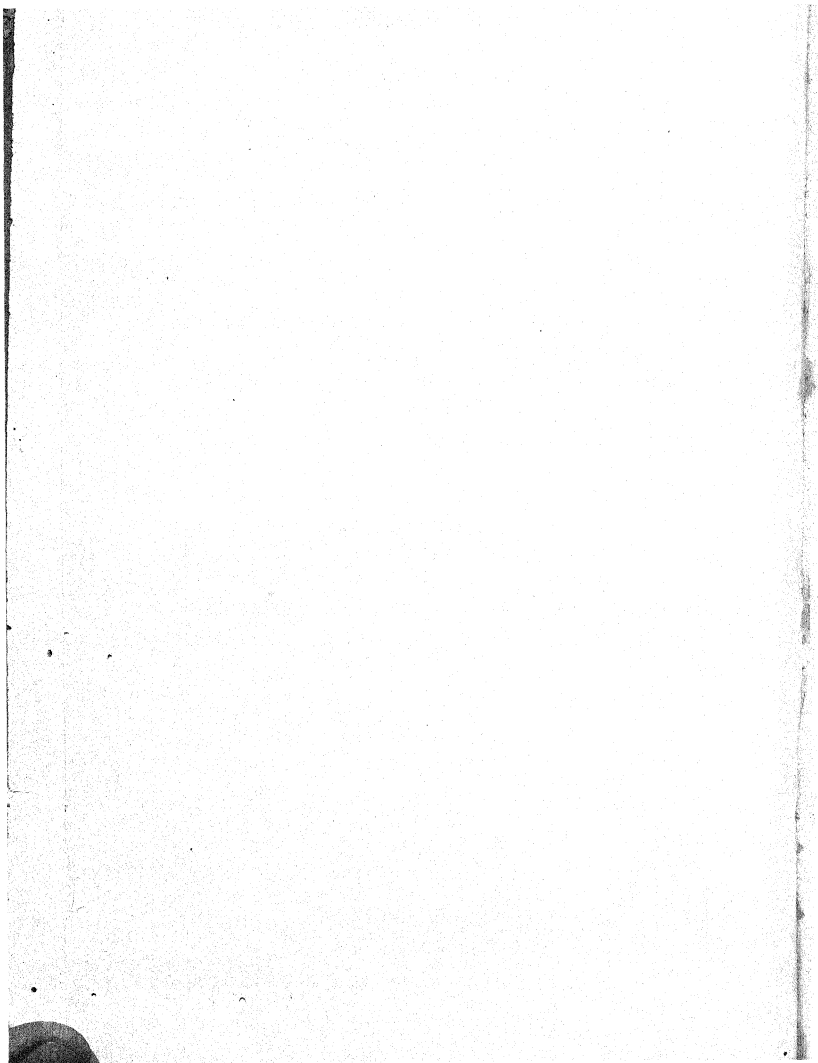
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THE INDIAN COMPANIES ACT, 1882.

ACT VI OF 1882.

[24th February, 1882.]

An Act¹ for the incorporation, regulation and winding-up of Trading Companies and other Associations.

WHEREAS it is expedient to amend the law relating to the
Preamble. incorporation, regulation and winding-up of Trading Companies and other Associations; It is hereby enacted as follows:—

(Notes).

General.

(1) Rules of construction.

(1) STATUTES TO BE INTERPRETED ACCORDING TO PLAIN MEANING.

- (a) Where the terms of an enactment are clearly expressed, the Court should read it according to the plain sense of the words, it being its duty to expound it as it stands. *Per Prinsep, J.* in 7 C. 127 (192) = 8 C.L.R. 409; see, also, 1 Hyde, 100. **A**
- (b) "The language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments." *Philpott v. St. George's Hospital*, 6 H.L. Cas. 338. **B**
- (c) The essence of a Code is to be exhaustive on the matters in respect of which it declares the law. On any point specifically dealt with by it, the law must be ascertained by interpretation of the language used by the Legislature and the Court cannot disregard or go outside the letter of the enactment according to its true construction. 3 C.L.J. 67 (71) = 33 C. 927 (931); see, also, 29 C. 707 (715) (P.C.) = 6 C.W.N. 825 = 4 Bom. L.R. 793 = 29 I.A. 196. **C**
- (d) Courts are bound to construe a section according to the plain meaning of the language used, unless, in the section itself or in any other part of the Act, anything is found that will either modify, qualify or alter the statutory language, even if the result of such construction lead to anomalies, or be productive of absurdity. See *per Lord Halsbury, L.C., Vestry of the Parish of St. Johns' Hampstead v. Cotton*, (1886), L.R. 12 App. Cas. 1 (6), referred to in 27 C. 11 (15). **D**
- (e) A Judge cannot modify the language of an Act, in order to bring it into accordance with his views of what is right and reasonable. *Per Wills, J., in Abel v. Lee*, 6 L.R.C.P. 731, referred to in 4 B. 624 (630); see, also, *Abley v. Dale*, 11 C.B. 891. **E**

(2) Effect to be given to every word.

- (a) One of the most elementary principles of the construction of statutes is that, if possible, effect should be given to every word. 21 C. 392 (399). **F**

General—(Continued).

- (b) "A statute ought to be construed so that, if it can be prevented, no clause, section or word shall be superfluous, void or insignificant." *The Queen v. Bishop of Oxford*, 4 Q.B.D. 245, followed in 28 M. 466 (471); see, also, 8 C. 459 (462). **G**

(8) Procedure where Act is not exhaustive.

Where a Code is not exhaustive, the Court has, in matters with which the Code does not deal, an inherent jurisdiction to act according to equity, justice and good conscience, though, in the exercise of such a power, it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. 3 C.L.J. 67=23 C. 927. **H**

(4) Pre-existing state of law and intention of Legislature—How far guides to construction.

- (a) The proper course of interpreting an Act intended to codify a particular branch of the law "is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." *Per* Lord Herschell, *Bank of England v. Vagliano*, (1891) A.C. 107, followed in 23 C. 563 (571) (P.C.)=23 I.A. 18; see, also, 7 C.W.N. 301 (306); 28 C. 517 (528)=5 C.W.N. 640 (646); 27 C. 649. **I**

- (b) The object of codifying a particular branch of the law is that, on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, roaming over a vast number of authorities in order to discover what the law is, extracting it by a minute critical examination of the prior decisions. *Per* Lord Herschell, *Bank of England v. Vagliano*, referred to in 23 C. 563=23 I.A. 18. **J**

- (c) In interpreting a statute, it is not necessary to consider what the law was before the passing of that statute, but what the Legislature has said is to be the law after the passing of the same. 28 C. 517=5 C.W.N. 640. **K**

- (d) A positive enactment in a statute cannot be qualified or neutralized by indications of intention gathered from previous legislations upon the same subject. 22 C. 788 (797) (P.C.). **L**

- (e) "The Court knows nothing of the intention of an Act, except from the words in which it is expressed, applied to the facts existing at the time." *Logan v. Courtown*, (Earl), 13 Beav. 22=20 L.J. Ch. 347. **M**

- (f) "The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute." *Fordyce v. Bridges*, 1 H.L.Cas. 1=11 Jur. 157, cited in 1 A. 487. **N**

(5) Proceedings of the Legislature, reference to, in interpreting statutes.

- (a) The proceedings of the Legislature which resulted in the passing of an Act are not legitimate aids to the construction of the provisions of the Act.

General—(Continued).

This rule of exclusion applies in construing Acts of the Indian Legislature, no less than in the construction of Acts of the British Legislature. 22 C. 788 (799, 800) (P.C.), *overruling* 21 C. 732; see, also, 22 C. 1017 (1022) (F.B.); 22 B. 112 (127). O

- (b) The Courts, in administering the statute Law, should not refer for guidance, either to the speeches in Parliament or in the Legislative Council of this Country or to reports made by the Select Committee in reference to the proposed legislation, but to the statute alone. 14 A. 145 (149, 150), *dissenting* from 14 C. 721 and 17 C. 852; 6 C. 171 (F.B.)=6 C. L.R. 439 (441); 7 B. 310 (315); 22 C. 788 (798, 799). P
- (c) For the purpose of construing an Act, the Court would be acting wrongly in referring to the debate on the Bill, when before the Legislative Council. 18 B. 133 (136). Q
- (d) Nor is it permissible to refer to the various forms in which the Bill was brought before the Legislature. 8 B. 241; 19 C. 544; 11 B. 1 (4). R

(6) Preamble, how far a guide in construction.

- (a) The preamble is the key to open the meaning of the framers of the Act, and the mischiefs it was intended to remedy. 9 C.P.L.R. 65 (67); *Salkeld v. Johnston*, 3 Q.B.D. 313. S
- (b) The purpose for which a preamble is framed is to indicate what, in general terms, was the object of the Legislature in passing the Act. 11 A. 262 (266). T
- (c) It lays down the limitation and restriction subject to which an enactment is passed. *Tarquand v. Board of Trade*, 11 App. Cas. 286. U
- (d) The preamble may, therefore, be consulted in case of doubt as an index to the intention of Legislature, though not conclusive as the statement of an extrinsic fact. 4 Bom. L. R. 547 (553); 11 A. 262; 11 B. 551 (552); 9 B.H.C.O.C. 205 (215). Y
- (e) It is always permissible to refer to the preamble for the purpose of keeping the effect of the Act within its real scope, as it usually states, or professes to state the intention of the Legislature in passing the enactment. 9 W.R. 402 (404); 7 C. 333 (336)=9 C.L.R. 209; 6 C. 707 (708)=8 C.L.R. 52; *Tarquand v. Board of Trade*, App. Cas. 286. W
- (f) The preamble must be read with the sections of the Act, as it is of great importance in construing the extent of the operations of the Act. 4 C.W.N. 116. X
- (g) The meaning of the title and preamble, especially of the preamble of a Code must be understood to overlie the whole Act, giving colour to, and controlling its provisions, and supplying *pro tanto* the rule for their interpretation. 2 A. 79 (90). Y
- (h) A construction of an Act far beyond its object, as stated at length in the preamble, should not be made, unless distinct words to that effect are used in it. 9 Bom. H.C.R. 321 (332). Z
- (i) But it sometimes happens that the general terms of a preamble do not indicate or cover all the mischief which the enacting portion of the Act provides for, and if the language of the enacting sections of the Act is clear, the terms of the preamble cannot be called in to restrict their operation or cut them. 11 A. 262 (266); see, also, *Thistleton v. Frewer*, 31 L.J. Ex. 230; 3 B.H.C.R.O.C. 45 (47); 14 C. 176 (183);

General—(Continued).

Young v. Hughes, 4 H. & N. 76; Maxwell's Interpretation of Statutes, p. 58, *et. seq.* A

- (j) Similarly, if the preamble provides for a wider mischief than the Bill in its section enacts, those sections should not be given a wider scope than the language properly interpreted justifies. 11 A. 145 (154). B

(7) Preamble whether part of the Act.

- (a) The preamble is undoubtedly a part of the Act and may be used to explain but not to control, the enacting part, which often goes beyond the preamble if words are to be found in the former, strong enough for that purpose. *Salkeld v. Johnston*, 1 Hare 196; also *Fellows v. Olney*, 5 Q.B. 318, referred to in 2 M.H.C.R. 322. But see *infra*. C
- (b) The preamble is no part of an enactment, but is a mere recital in an Act, either of fact or law, and is not conclusive, and Courts are at liberty to consider the statement of the law or fact to be different from the statement in the recital. 2 B. 19 (38); *Reg v. Houghton*, E. and B.I. 501, referred to. D

(8) Marginal notes—How far a guide in construction.

- (a) It is a well-settled rule, that, in English Law, the marginal notes cannot be referred to for the purpose of construing an Act. The marginal notes in an Indian Statute have no greater authority than the marginal notes in an English Act of Parliament. 26 A. 393 (406) (P.C.)=7 O. C. 248=8 C.W.N. 699 (705). E
- (b) They do not form part of the Act, and cannot be looked to for construing the section. 25 C. 858 (862), following *Sutton v. Sutton*, (1882) L. R. 22 Ch. D. 511, and 23 C. 55; see, also, 20 C. 609 (628); 2 A. 74 (90); 4 M.I.A. 179; 5 C. 300 (309); 14 A. 145 (154); 24 B. 120 (122). F

(9) Headings of chapters, reference to.

- (a) The heading of a chapter is sometimes referred to in construing an Act. See 6 B.H.C. (A.C.J.) 258 (260). G
- (b) But the headings have been held to form no part of the Act, in 20 A. 501 (505). H

(10) Illustrations how far guide construction.

- (a) "Illustrations greatly facilitate the study of the law. They will lead the mind of the student through the same steps by which the minds of those who passed the law proceeded, and may sometimes show him that a phrase which may have struck him as uncouth, or a distinction which he may have thought to be superfluous, was deliberately adopted for the purpose of including or excluding a large class of important cases. See Whitley Stoke's Anglo Indian Codes, Vol. I, p. xxiv. I
- (b) Illustrations are not merely examples of the law in operation, but the law itself, showing by examples what it is. See *Gazette of India Extraordinary*, 1st July 1864, p. 53. J
- (c) But they are only intended to assist in construing the language of the Act. *Per Couch, C. J.*, 22 W.R. 367. K
- (d) They make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effects will be on the events of common life. Whitley Stoke's Anglo Indian Codes, Vol. I, p. xxv. L

General—(Concluded).

- (e) Illustrations do not, strictly speaking, form part of the Act to which they are attached, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Act, and in that and in other respects they may be useful, provided they are correct. 1 A. 497 (495); see, also, 1 A. 34 (36); 15 B. 491 (496). **M**
- (f) Where the language of a section is clear, it is opposed to the rules of construction to limit or vary its meaning by reference to the illustrations appended to it. 1 A. 487 (496); see, also, 21 W.R. 66; 28 M. 57. **N**
- (g) They cannot be read so as to supply any omissions in the written law or to put a strain on it. Whitley Stoke's Anglo Indian Codes, Vol 1, p. XXIV. **O**
- (h) They may be useful so far as they explain the meaning of the section, but must never be allowed to control its plain meaning, especially when the effect would be to curtail a right which it would, in its ordinary sense, confer. 7 C. 132 (135) = 8 C.L.R. 231 (233); see, also, 22 W.R. 367 (368). **P**

(11) Consolidating Acts—Construction of.

- (a) In construing a consolidating Act, it is necessary to have a knowledge of the pre-existing law, as established by statutory enactments and reported decisions. See *Mitchell v. Simpson*, 25 Q.B.D. 183; *Re Budgett*, (1894) 2 Ch. 557. **Q**
- (b) But there is no authority for the proposition that in dealing with a consolidating statute, each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. 22 C. 788 (798). **R**

I.—“Act.”

(1) Object of the Act.

James, L.J., said with reference to the English Companies Act of 1862 “The Act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and were put to great difficulty and expense, which was a public mischief to be repressed.” *Smith v. Anderson*, 15 Ch. D. 273. **S**

N.B.—The same remarks will hold good in the case of the Indian Companies Act.

(b) For statement of Objects and Reasons, see Gazette of India, 1881, Pt. V, p. 1275; for Proceedings in Council, see *ibid.* 1881, Supplement, pp. 932 and 1100, and *ibid.* 1882, Supplement, p. 203. **T**

N.B.—The provisions of the Act do not apply to Societies registered under the Co-operative Credit Societies Act, 1904 (X of 1904). See S. 28, Act X of 1904.

N.B.—Ss. 3 to 10 of the Indian Companies (Memorandum of Association) Act, 1895, are to be read with, and taken as part of, this Act, and the Companies (Branch Registers) Act (IV of 1900), is to be construed as one with this Act. By Act IV of 1910, Ss. 73-A and 73-B have been added.

I.—“Act”—(Concluded).

(2) Relation of the Act to English Law.

(a) The Act is to a great extent a reproduction of the Indian Companies Act of 1866, which again was based on the English Companies Act of 1862 (25 & 26 Vic. c. 89). U

(b) The Act now in force in the United Kingdom is the Companies (Consolidation) Act of 1908 (8 Edw., 7, C. 69) which came into force on the 1st April, 1909. The Act, as its name implies, consolidates into one Act the law contained in the seventeen statutes known as the Companies Acts, 1862 to 1907, besides repealing and re-enacting some other relevant statutes. The Act was intended primarily to re-produce the existing law contained in the repealed statutes, and has made no changes in the law except in some small particulars. The Act effects a consolidation, not a codification of the law. See Emden, 8th Ed., p. 1. Y

(3) Consolidation—Object of.

The object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is passed. 22 C. 788(798). W

(4) English decisions how far a guide in construing the Act.

(a) Where the words of the English and the Indian Acts are the same, English decisions may be referred to in construing the Indian Act. 7 O.C. 116 = 26 A. 299 (310) = 31 L.A. 116 (P.C.). X

(b) In interpreting an Indian Act, help may be derived from the English cases which are as much authoritative as the decisions of the Superior Courts of India, and where the Indian Law is similar or the same, their authority is conclusive. See 12 Q.B.D. 224. Y

(5) Utility of codification.

Codification can remedy the evils which arise from the uncertainty of the law, can enable the public to know their exact rights and obligations, can enable proprietors and litigants, Advocates and Judges, to know for certain the law which regulates the dealings of citizens, and will enable the deliberate will of the Legislature to prevail over the opinions of individual Judges. See the speech of the Hon'ble Syed Ahmed, 25th Jan. 1882, when the Transfer of Property Act was passed. Z

PRELIMINARY.

- Short title. 1. This Act may be cited as the Indian Companies Act, 1882 ¹.
- Local extent. It Extends to the whole of British India ²:
- It shall come into force on the first day of May, 1882 ³; and the time at which it comes into force is herein after referred to as the commencement of this Act ⁴.
- Commencement.

(Notes).

1.—“*This Act... 1882.*”

Title of an Act whether part of Act.

- (a) The title of an Act of Parliament must be read as part of the Act. *Fielden v. Morley Corporation*, (1899) 1 Ch.O.A., 1900, A.C. 1138. A

2.—“*It extends... British India.*”

(1) British India, meaning of.

“British India” means all territories and places within Her Majesty’s dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India. General Clauses Act, X of 1897, S. 2 (7). B

(2) Application of the Act to Burma and British Baluchistan.

- (a) The Act was declared to be in force in Upper Burma generally (except the Shan States) by the Upper Burma Laws Act, 1886 (XX of 1886), S. 6; see S. 4 of the Burma Laws Act, 1898 (XIII of 1898), by which Act XX of 1886 has been repealed; and to British Baluchistan, under S. 5 of the Scheduled Districts Act, XIV of 1874; see Gazette of India, 1895, Part II, p. 9. C

3.—“*It shall... May, 1882.*”

(1) Acts generally prospective in operation.

Acts are generally prospective in their operation and not retrospective. To give an Act of the Legislature a retrospective effect is not in accordance with sound principles of interpreting statutes. 8 C.W.N. 201 (P.C.). See, also, 5 M.L.A. 109. D

(2) Acts when retrospective.

- (a) An Act is given a retrospective effect, (1) when it is expressly declared to be so, or (2) when the Act affects the procedure of the Court. 14 B. 516. E
- (b) Though an Act may not contain express words to indicate that it is to have any retrospective effect, still, it may be shewn, by the general scope and purpose of the enactment, that it is intended to have such effect. 22 C. 767 (780); see, also, *Pardo v. Bingham*, L.R. 4 Ch. App. 740. F
- (c) “A statute is not properly called a retrospective statute, because a part of the requisites for its action is drawn from a time antecedent to its passing,” *Per Lord Denman, Queen v. The Inhabitants of St. Mary White Chapel*, 12 Q.B. 127. G

(3) Effect of change of substantive law on pending proceedings.

Where the law is altered while an action is pending, the law as it existed, when the action was commenced, must decide the rights of the parties, unless the Legislature, by the language used, shew a clear intention to vary the mutual relations of such parties. 3 B.H.C.O.C. 45 (47), following *Hitchcock v. Way*, 6 A. & E. 943; see, also, 14 C. 553 (556); 15 C. 376; and S. 6 of the General Clauses Act (X of 1897). H

N.B.—The proposition that a law creating a new right ought not to have retrospective effect is, however, not universally true. The rule against retrospective operation is intended to apply not so much to a law creating a new right as to a law creating new obligation or interfering with

3.—“It shall....May, 1882”—(Concluded).

vested rights. *Per Banerjee, J.* in 22 C. 767 (777), following *Reid v. Reid*, L.R. 31 Ch. D. 408; *Gardner v. Lucas*, L.R. 3 App. Cas. 587; see, also, Maxwell, on the Interpretation of Statutes, 2nd Ed., p. 257 Will be force on Statute Law, p. 157; Sedwick on Statutory Law, 2nd Ed., p. 160. I

(4) Effect of change of law of procedure on pending proceedings.

(a) Where new enactment effects no change in the substantive law, but only enacts a rule of procedure, such enactment would apply even to pending suits. 6 A. 262 (F.B.); 16 A. 259 (F.B.); 3 B.H.C.O.C.J. 49 (52), following *Wright v. Hale*, 80 L.J. Ex. 40. J

(b) But in 22 C. 767 (781) it has been held that S. 6 of the General Clauses Act, has the effect of making pending proceedings continue to be regulated by the old procedure. K

(c) In the same case, Banerjee, J., expressed an opinion that the object of S. 6 of the General Clauses Act might be simply to leave proceedings commenced under the old Act unaffected by the repealing Act only so far as they had proceeded, leaving their further progress to be regulated by the procedure in force after the repeal. L

N.B.—The operation of that section is limited to cases in which the change in the law is the result of the old enactment, and does not extend where it is due merely to an addition to it. (*Ibid.*) M

4.—“The time....of this Act.”

Commencement of the Act.

This provision is in accordance with S. 3 (12) of the General Clauses Act (X of 1897), which says, “commencement,” with reference to an Act or Regulation, shall mean the day on which the Act or Regulation comes into force. N

2. On and from the commencement of this Act the Indian Companies Act, 1866, shall be repealed¹. But
 Repeal of Act X of 1866. repeal shall not affect—

- (a) the incorporation of any Company registered under the said Act or any Act thereby repealed²;
- (b) any right of privilege acquired, or liability incurred, under the said Act or any Act thereby repealed;
- (c) table B in the Schedule annexed to Act No. XIX of 1857 or any part thereof, so far as the same applies to any Company existing at the time of the commencement of this Act.

And all references to the said Indian Companies Act, 1866, in Acts or Regulations passed before the commencement of this Act shall be read as if made to this Act; and all rules made, fees directed, resolutions passed and other things duly done under the same Act shall be deemed to be respectively made, directed, passed and done under this Act; and all Companies under the same Act shall be deemed to be Companies under this Act.

(Notes).

1.—“On....shall be repealed.”

Repeal of a repealing enactment—Effect of.

Where a section, or the whole, of an enactment is repealed by another enactment, and the latter enactment itself is repealed by a still later enactment, the effect of such last repeal will not be to restore the first mentioned section or enactment, unless there is an express provision to that effect in the last enactment. 9 B. 233; see, also, 7 M.H.C. Ap. 9 and General Clauses Act, X of 1897, S. 6 (a) and S. 7. O

2.—“The Incorporation....repealed.”

(1) Proceedings under the Act of 1866, not affected by this Act.

(a) Where an application for the registration of a Company, accompanied with the Memorandum and Articles of Association was received in the office of the Registrar, when the Act of 1866, was in force, but before the certificate of incorporation was issued, the Act of 1866 was repealed by the Act of 1882, *held*, that the repeal of the old Act did not affect the proceedings instituted under that Act, and the Company must be deemed to have been incorporated under the old Act. 11 A. 349. P

(b) The repeal of an old Act would not affect any proceedings commenced before the repealing Act came into operation, unless the latter Act is retrospective in its operation. 3 Bom. L.R. 584; see, also, 3 C. 727; 4 C. 536=3 C.L.R. 434. Q

(c) The Act is, so far as Act X of 1866 was concerned, a repealing Act within the meaning of S. 6 of Act I of 1868, under which “the repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall come into operation.” 11 A. 349 (359). R

(2) Proceedings for registration of a Company, commencement of.

Proceedings for the registration of a Company commence on the date on which the application of the projected company, together with the Memorandum and Articles of association stamped and duly drawn up, is received in the office of the Registrar of Joint Stock Companies and not from the date of the grant by him of the certificate of registration. 11 A. 349 (359). S

Interpretation-clause. 3. In this Act, unless there be something repugnant in the subject or context,—

“Insurance Company” means a Company that carries on the business of insurance either solely or in common with any other business or businesses;

“Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in the exercise of its ordinary original civil jurisdiction;

“District Court” means the principal Civil Court of original jurisdiction in a district, but does not include the High Court in the exercise of its ordinary original civil jurisdiction.

(Notes).

General.

Definitions and meanings of words.

- (a) The effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all the places of the Act in which the word occurs, and not to annex to the thing defined every incident attached to it by any other Act of the Legislature. 12 C. 430 (433); see also, 15 A. 141 (143). **T**
- (b) It would be unreasonable to hold that the Legislature used the same word in different senses in the same Act. 22 B. 235 (238). **U**
- (c) The Court is not at liberty to import into a Code definitions which are provided for the purposes of some other Act of the Legislature. 15 A. 141 (143). **Y**
- (d) When certain words that have received a judicial interpretation have been repeated with no alteration in a subsequent Statute, the Legislature must be taken to have adopted the same meaning. *Per James, L.J., in Ex parte Campbell, L.R. 5 Ch. App. Cas. 703 (706); referred to in 29 C. 890 (905)=11 C.W.N. 1005 (P.C.).* **W**

4. No Company, Association or Partnership ¹ consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a Company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor General in Council, or by Royal Charter or Letters Patent; and no Company, Association or Partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the Company, Association or Partnership, or by the individual members thereof ², unless it is registered as a Company under this Act, or is formed in pursuance of some other Act or of Letters Patent³.

(Notes).

General.

Corresponding English Law.

This section corresponds to Sec. 1, Companies (consolidation) Act, (8. Edw. vii, c. 69). The words 'or some other Act of the Governor General in Council, or by Royal Charter' occurring in the above section, do not appear in S. 1, of the English Act.

The clause 'or is a company engaged in working mines within the stanneries and subject to the jurisdiction of the court exercising stanneries jurisdiction,' occurring at the end of S. 1. of the English Act, does not appear in S. 4 of the 'Indian Act.'

1.—"Company, Association or Partnership."

(1) Association, meaning of,

- (a) "Association" perhaps means a combination of persons or of firms to carry out a particular adventure. *Smith v. Anderson* 15 Ch. D. 277, 288; *St. James Club*, 2 D.M. & G. 383. See Buckley, 9th Ed., p. 2. **X**

1.—“Company, Association or Partnership”.—(Concluded).

- (b) According to its etymology, the word “association” simply means a combination of individuals formed together for a common purpose, and this is also what it means in popular parlance. 1 M.L.T. 106 (107). Y
- (c) Though according to the rule *noscitur a sociis* the term “association” as used in the section, must be something *ejusdem generis* with a “Company” or a “partnership” as mentioned therein, it need not necessarily be the same as a Company or partnership. (*Ibid.*) Z

(2) Unincorporated Company and partnership compared.

An unincorporated Company is an association of members, the shares of which are transferable, and it does not differ from a partnership except as to the transferability of shares. *Reg v. Registrar of Joint Stock Companies*, (1891) 2 Q.B. 610. See, also, *Re Stanley*, (1906) 1 Ch. 181, 184. A

2.—“Shall be formed...members thereof.”

(1) Section applicable only to commercial undertakings.

The section requires registration only of commercial undertakings as distinguished from literary, scientific and charitable associations. See *Arthur Average Association*, E. P. Husgrove & Co., 10 Ch. 545. Padstow Association, 20 Ch. D. 137, 145, 148, 149. B

(2) Commercial undertakings and charitable undertakings, distinguished.

- (a) Commercial undertakings include all companies formed to acquire something, or whose members are to acquire something, as distinguished from companies formed to spend something or whose members are to give away or spend something, and not to gain. Buckley, 9th Ed., p. 2. C
- (b) The Act “distinguishes between commercial undertakings on the one hand, and literary or charitable associations on the other hand, in which persons associate, not with a view of obtaining personal advantage, but for the purpose of promoting literature, science, art, charity or something of that kind. *Per Jessel, M.R., In re Arthur Average Association*, (1875) 10 Ch. 548 (n). D
- (c) Where the substantial purpose of an association is not to carry on a business for gain, the fact that gain may accrue incidentally or may arise from merely subsidiary provisions does not make registration necessary. 17 C. 786 (808). E
- (d) A family pension fund formed with the object of providing for the maintenance of the widows, children and other relatives of the subscribers to the fund, is not an association having for its object the acquisition of gain by the association or the individual members thereof within the meaning of the section, and need not be registered though the number of subscribers exceeds twenty. 17 C. 786. F

(3) Association under the section, essentials of.

- (a) To constitute an association within the meaning of the section, the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. 29 M. 478 (483), following 20 M. 68. See, also, *Smith v. Anderson*, 15 Ch. D. 247; 2 M.L.T. 52. G
- (b) “Persons who have no mutual rights and obligations do not constitute an association, because they happen to have a common interest or several

2.—“*Shall be formed....members thereof*”—(Continued).

interests in something which is to be divided between them.” *Per* James, L.J., in *Smith v. Anderson*, 15 Ch. D. 247, 275. **H**

(4) **Business managed by trustees, nature of.**

(a) Where a business is carried on by trustees as trustees and not as agents or directors, the case will not come within the Act if the trustees are less than 20 in number. *Smith v. Anderson*, 15 Ch. D. 247 (1880). See, also, *Crowther v. Thorne*, (1884) 50 L. T. 43; *Wiggfield v. Potter*, (1881) 45 L.T. 612; *Re Siddall*, (1885), 29 Ch. D. 1. **I**

(b) Where the business of an association is carried by trustees in their own names, without reference to the direction or orders of the association, and where, as between themselves and third parties, they are responsible on their contracts, the trustees act as trustees only and not as agents or directors of the Company and if they are less than 20 in number, the company need not be registered. *Crowther v. Thorne*, (1884) 32 W.R. 330; see, also, *Smith v. Anderson*, 15 Ch. D. 247. **J**

(c) Thus, an association consisting of more than 20 persons who have subscribed to a common fund to be invested by trustees in certain securities does not require registration. *Smith v. Anderson*, (1880) Ch. D. 273. **K**

N.B.—But an association of more than 20 persons carrying on business must be registered under the section, where the business is carried on and managed by a committee of members acting as agents of the society, though their number may be less than twenty and though they may have full powers as to management and making bye-laws. *Re Thomas*, exp. *Poppleton*, (1885) 14 Q.B.D. 379. See, also, *Shaw v. Benson*, 11 Q.B.D. 563. **L**

(5) **Distinction between trustee and director.**

A trustee deals with the trust property as principal, as owner, and as master subject only to the obligation to account to the *cestui que trust*, whereas a director enters into contracts not for himself, but for the company, and can neither sue nor be sued on them, unless he exceeds his authority. *Per* James, L.J., in *Smith v. Anderson*, 15 Ch. D. 247 (1880); see, also, *Crowther v. Thorne*, 32 W.R. 330 (1884). **M**

(6) **Test of agency.**

The test whether a person acts as an agent of others in carrying on a business would turn on the question whether the others have power to revoke the authority given to him. 13 C.W.N. 638 (642). **N**

(7) **All members must be interested in management.**

(a) The section does not apply, unless all the members are directly interested in the management of the concern, either personally or through their duly constituted agent. 13 C.W.N. 638 (641), following *Smith v. Anderson*, 15 Ch. D. 247 and *Crowther v. Thorne*, 32 W.R. 330 (1884). **O**

(b) Where N, who obtained a license for catching wild elephants, organised a *khedda*, in which enterprise a number of people joined him as *shariks*, and an agreement was entered into not between all the partners in favour of all, but between N on one side and the *shariks*, on the other, as to the business of the *khedda* and the division of the profits among the *shariks*, and where the partners were taken on the condition that they should have no power to interfere with N as to the capture and sale of the elephants, but were only had to have a share of the profits, and where it appeared further, that the business by N was commenced

2.—“*Shall be formed....members thereof*”—(Continued).

before the other partners were taken, *held*, the association carried on no business as an association and so did not come within the scope of this Act. 13 C.W.N. 638. O

(8) Examples of associations under the section.

- (a) A mutual benefit loan society and a mutual insurance company come within the scope of the section. *Jennings v. Hammond* (1882), 9 Q. B.D. 225; *Shaw v. Benson*, (1888) 11 Q.B.D. 563; *Re Padstow Total Loss &c., Association*, 20 Ch. D. 137; *E. P. Husgrove & Co.*, 10 Ch. 545; *cf. Marra v. Thomson*, (1902), 86 L.T. 759. P

N.B.—Mutual insurance societies and loan societies are instances of associations formed for the acquisition of gain, not by the Companies but by the individual members thereof. See *Reg v. Whitmarsh*, 15 Q.B. 600; also *Shaw v. Benson*, 11 Q.B. Div. 569.

- (b) A loan society consisting of more than twenty members, who contribute to a fund, out of which advances are made to members at interest to build or buy a house, is within the section, though the business of the society is managed by a committee consisting of less than 20 members provided the committee act as agents and not as principals. *Shaw v. Benson*, 11 Q.B.D. 563; *Re Thomas*, 14 Q.B.D. 379. Q
- (c) An association of artisans formed for the purpose of enhancing the price of their work, by bringing all the business of the trade into one shop and dividing the prices of the work done amongst the members according to their skill, is an association that has for its object the acquisition of gain, and, must be registered under the Act, if it consist of more than 20 persons. 1 Bom. 550. R

(9) *Chit funds and kuris*—When to be registered.

- (a) In 19 M. 31 it was *held* that a *chit fund* consisting of more than 20 members was an association formed for the acquisition of gain within the meaning of this section, and illegal unless registered under the Act. In the absence of such registration, no suit was maintainable to recover subscriptions payable by the members. S
- (b) But, in 20 M. 68 = 7 M.L.J. 26, it has been *held*, whether an undertaking which generally goes by the name of *chit* or *kuri* falls within the section or not depends, not upon the mere name given to the undertaking, but on the existence of the essential characteristics required by that provision of the law. Whether these requirements are present must be ascertained in each case. T
- (c) Thus, a lottery in which more than twenty persons take tickets, under an arrangement with the promoters that the prize-winners should continue their subscriptions for two more years, is not an association of twenty persons for the purpose of gain, and requires no registration. 20 M. 68. U
- (d) If, therefore, the prize-winners fail to continue the subscriptions, the promoters can sue them to recover the same. (*Ibid.*) Y

N.B.—Commenting on 19 M. 31, the Madras L.J. (Vol. VII, Pt. III, p. 111) says that “the mischievous effect of the decision in this case, consequent mainly on the erroneous understanding of the decision will be dispelled by the present case.” (*viz.* 20 M. 68).

2.—“*Shall be formed...members thereof*”—(Continued).

- (e) Where a *chit fund* consisting of more than 20 subscribers was organised by two persons who occupied the position of principals or proprietors, and there was no legal relation between the members giving rise to joint rights or obligations or mutual rights and duties but each subscriber was personally liable to the organisers and the organisers to him, *held*, the members to the fund did not constitute an association of which registration is compulsory under the section. 29 M. 477. **W**
- (f) But, if there is a joint relation between the members, and there are joint rights and obligations *inter se* among the members, then, the *chit fund* if it consists of more than twenty persons, is an association of which registration is compulsory under the section. 1 M.L.T. 106. **X**

(10) *Kuri*—Not a lottery.

A *kuri* where the fund is distributed by lot is not a lottery. The fact that the total monthly subscriptions are given to each subscriber in turn, the order being determined by lot would not constitute it a lottery within the meaning of S. 294-A. I.P.C. 22 M. 212; 1 M.H.C.R. 448, *F*. **Y**

(11) *Business*—Meaning of.

The word ‘business’ is used in a wider sense than the word ‘trade’, and includes farming and banking neither of which is strictly a trade. *Smith v. Anderson*, 15 Ch. D. 258, 259; See, also, *Harris v. Amery*, (1865), L.R. 1 C.P. 148. **Z**

(12) *Banking Company*.

A corporation or company acting as bankers is a ‘banker’ within the meaning of S. 3 of the Negotiable Instruments Act (XV of 1881). **A**

(13) *Savings Bank Company* not necessarily a *Banking Company*.

A savings bank company need not be a banking company within the meaning of the section. *Smith v. Anderson*, 15 Ch. D. 247, 275. **B**

(14) *Gain*—Meaning of.

‘Gain’ is not confined to pecuniary gain, still less, to commercial profit. It means acquisition, and includes securing indemnity against loss in carrying on a trade. *Arthur Average Association, E. P. Husgrove & Co.*, 10 Ch. 545; *Padstow Association*, 20 Ch. D. 137. **C**

(15) ‘*Formed*’—Meaning of.

“Formed” in the section means “formed in this country.” See *Bateman v. Service*, 6 A.C. 386. **D**

(16) *Foreign Corporations* need not be registered.

- (a) A foreign Corporation may carry on business, in this country without being registered here. *Cf. Bateman v. Service*, 6 A.C. 386. **E**
- (b) Such a corporation is entitled to sue in its corporate character in this country without being registered under this act or an Act of Parliament, and o. XXIX, r. 1 of the Civ. Pro. Code (Act V of 1908). (=S. 435, C.P.C. (1882), applies to such suits. 30 C. 103. **F**

2.—“*Shall be formed....members thereof*”—(Continued).

- (c) This exemption is in accordance with the policy of encouraging foreigners to trade to the largest extent possible within the kingdom: it would obviously be unwise to impose any restrictions which would hinder foreign corporations from placing their orders for goods or selling their own products in this country. See *Gore-Brown and Jordan*, 30th Ed. p. 326. G

(17) Foreign corporation—What is.

A company that is incorporated in a foreign country is a foreign corporation though all its members may be Indians. Cf. *Jonson v. Driefontein Mines*, (1902) A.C. 497, 493, 501, 505; *Gramophone, Limited v. Stanley*, (1906) 2 K.B. 856. H

(18) Indian Corporation.

- (a) A company registered in India is an Indian Corporation, though all the corporators may be foreigners. See explanation to S. 6, *infra*. See, also, *General Co. for the Promotion of Land Credit*, 5 Ch. 363; L.R. 5 H.L. 176; *Madrid and Valencia Railway Co.*, 3 De. G. & Sm. 127; 2 Mac. G. 169; *A.G. v. Jewish Colonization Association*, (1901) 1 K.B. 130. I

N.B.—Similarly, a Corporation registered in the United Kingdom is a British Corporation, and such a Corporation may own a British ship though some or perhaps all the members are foreigners. *Reg v. Armand*, 9 Q.B. 806.

- (b) A company may be registered in India though the whole or any part of the business of the company is intended to be transacted out of British India. See Explanation to S. 6 *infra*. See, also, *General Co., for the Promotion of Land Credit*, 5 Ch. 363; L.R. 5 H.L. 176; *Madrid and Valencia Railway Co.*, 3 De. G. & Sm. 127; 2 Mac. & G. 169; *A.G. v. Jewish Colonization Association*, (1901) 1 K.B. 130. J

- (c) But it must have a registered office in this country and if it carries on business without having such an office, it incurs a penalty not exceeding Rs. 50 a day. See S. 63, *infra*. K

(19) Rules governing foreign Corporations—English Law.

- (1) Under the English Companies (Consolidation) Act of 1908, S. 274, a Company incorporated outside the United Kingdom which establishes a place of business in the United Kingdom, shall, within one month of the establishment of the place of business, file with the Registrar; L

- (a) a certified copy (or if the instrument is not in English, a certified translation in English) of the charter, statutes, or memorandum and articles of the Company or other instrument constituting or defining the constitution of the Company; M

- (b) a list of the directors of the Company; N

- (c) the names and addresses of some one or more persons resident in the United Kingdom authorized to accept on behalf of the Company service of process or any notices required to be served on the Company;

and in the event of any alteration in any of the above matters, notice of the alteration shall, within the prescribed time, be given to the Registrar. O

2.—“*Shall be formed....members thereof*”—(Concluded).

- (2) Any process or notice required to be served on the Company will be sufficiently served if addressed to any person whose name has been so filed as aforesaid and left at or sent by post, to the address so filed. P
- (3) The Company shall every year file with the Registrar a statement similar to the balance sheet which a British Company should include in the annual summary. Q
- (4) Every such Company which uses the word “Limited” as part of its name, shall (a) in every prospectus inviting subscriptions for its shares or debentures in the United Kingdom state the country in which the company is incorporated; and (b) conspicuously exhibit in every place where it carries on business in the United Kingdom the name of the Company and the Country in which it is incorporated and (c) have the name of the company and of the country of incorporation mentioned in legible characters in all bill-heads and letter paper, advertisements, and other official publications of the Company. R

In case of default, the Company and every officer or agent of it is liable to a fine not exceeding £ 50, and in case of a continuing offence, £5 for every day during which the default continues. S

N.B.—(a) “The object of these provisions is to enable customers dealing with foreign Companies to know something of the Corporations with which they are dealing and to render the service of writs and other processes easier.” *Gore-Brown and Jorden*, 30th Ed. p. 328.

- (b) The provisions apply only to Companies having a place of business in the United Kingdom, and not to such as do business only through-agents or by correspondence from abroad. *Grant v. Anderson & Co.*, (1892) 1 Q.B. 108.
- (c) The Indian Act does not contain any provision corresponding to S. 274 of Companies (Consolidation) Act.

(20) Mining Companies in stanneries—English Law.

In England, a company though consisting of more than twenty persons need not be registered under the Companies Act, if it is engaged in working mines in the stanneries and is subject to the jurisdiction of the Courts exercising the stanneries jurisdiction. See S. 1, Companies (Consolidation) Act, 1908. T

3.—“*Unless it is registered....Letters Patent.*”

(1) Effect of registration.

- (a) The legal entity created by registration is a corporate body totally distinct from the individuals comprising it. See S. 41, *infra*; also *Salomon v. Salomon*, (1897) A.C. 51 p. 51, *Koduk, Ltd. v. Clark*, (1903) 1 K.B. 505. U
- (b) Hence a sale by a person to a Corporation of which he is a member is valid, and is not either in form or substance a sale by that person to himself. *Farrar v. Farrars Ltd.*, (1898), 40 C.D. 395. V
- (c) Such a sale cannot be impeached on the ground that it was in pursuance of a resolution which was carried by the votes of that member. *North West Transportation Co. v. Beatty*, (1897) 12 A.C. 589, *approved in Burland v. Earle*, (1902) A.C. 83. W

3.—“*Unless it is registered....Letters Patent*”—(Concluded).

(2) Incorporated Company, not a trustee or agent for the members.

An incorporated Company is not in law, the agent of the subscribers or trustee for them, though it may be that the business is precisely the same as it was before its incorporation, and the same hands receive the profits.
Per Lord Macnaghten in Salomon v. Salomon & Co., (1897) A.C. p 51. X

(3) Effect of non-registration.

(a) An association which does not comply with the provisions of the section in respect of registration is illegal, and *prima facie* cannot be wound up by the Court. *In re Padstow Association*, 20 Ch. D. 137; *South Wales Atlantic Steamship Co.*, 2 Ch. D. 763. See, also, *Doolan v. Midland Railway Co.*, 2 A.C. 792, 806. Y

(b) Such an association cannot sue to recover debts due to it. *Shaw v. Benson*, (1883) 11 Q.B.D. 563. Z

(c) Nor can it be sued upon contracts entered into by it. 3 Bom.O.C. 159. A

(d) A contract entered into by a Company which is illegal for want of registration cannot be enforced by the Company even after its registration. 3 B. H.C R. (O.C.) 45. B

(e) But the Company can, after it has become legal by registration, sue to enforce a contract entered into before registration, if it can be shown that the defendant had recognized the Corporation as his creditor. *Re Thomas*, 14 Q.B.D. 379. C

N.B.—An order for the administration of the funds of an association illegal for want of registration, was made in *Hume v. Record Reign Syndicate*, 80 L.T. 404.

N.B.—An unregistered association with less than twenty members becomes illegal when the members become more than twenty in number. *Re Thomas*, 14 Q.B.D. 379.

5. This Act is divided into nine parts, relating
 Division of Act. to the following subject-matters :—

The First Part—to the constitution and incorporation of Companies and Associations under this Act ;

The Second Part—to the distribution of the capital and liability of members of Companies and Associations under this Act ;

The Third Part—to the management and administration of Companies and Associations under this Act ;

The Fourth Part—to the winding-up of Companies and Associations under this Act ;

The Fifth Part—to the registration-office ;

The Sixth Part—to the application of this Act to Companies registered under Act No. XIX of 1857 (*for the incorporation and regulation of Joint-Stock Companies and other Associations, either*

with or without limited liability of the members thereof), and Act No. VII of 1860 (*to enable Joint-Stock Banking Companies to be formed on the principle of limited liability*), or either of them ;

The Seventh Part—to Companies authorised to register under this Act ;

The Eighth Part—to the application of this Act to unregistered Companies ;

The Ninth Part—to miscellaneous provisions.

(Notes).

Corresponding English Law.

This section corresponds to S. 5 of the English Companies Act of 1862, but there is no corresponding section in the Companies (Consolidation) Act, (1908). C 1

N.B.—For a full discussion of the various sections of the English Act of 1862, relating (i) to Capital ; (ii) to Call and the liability of members in respect of their shares ; (iii) to the Collection and distribution of assets in a winding-up, see the judgment of Lindley, L.J. in *Pyle Works*, 44 Ch. Div. 583. C 2

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Memorandum of Association.

6. Any seven or more persons associated for any lawful purpose ¹ may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated Company ², with or without limited liability.

Explanation.—Foreigners are persons within the meaning of this section, although the whole or any part of the business of the proposed Company is intended to be transacted out of British India.

(Notes).

Corresponding English Law.

This section corresponds to the first paragraph of S. 2 of the English Companies (Consolidation) Act.

The English Act contains the words “or, where the company to be formed will be a private company within the meaning of this Act, any two or more persons” within brackets, after the words “Any seven or more persons.” C 3

I.—“ Any seven . . . purpose.”

(1) “ Person ”—Meaning of.

The term “ person ” includes any Company or Association or body of individuals whether incorporated or not. See General Clauses Act, X of 1897, S. 8 (39). D

(2) Limited Company as share-holder.

(a) Hence an incorporated Company may, if authorized by its memorandum and articles, become a member in another limited company. *Bath's case*, 1878, 8 Ch. D. 334; See, also, *Barned's Banking Co.*, *ex parte*, *Contract Corporation*, (1868) 3 Ch. 105; *Royal Bank of India's case*, 7 Eq. 91; 4 Ch. 252. E

(b) It may sometimes, even if not so authorised, take shares in another Company, as where shares are taken by way of compromise for a debt but not with the intention of permanently retaining them. *Lands Allotment Co.*, (1894) 1 Ch. 616. F

(c) A Joint Stock Company could not, unless expressly authorised by its memorandum, hold shares in another Joint Stock Company. 4 B.H.C.R. 185. G

(d) A limited Company may, when authorized by its memorandum and articles, hold shares in an unlimited Company. See *Buckley*, 9th Ed. p. 7. H

(3) Limited Company being member of unlimited Company—Extent of liability.

“ If a Corporation becomes a shareholder in an unlimited Company, it is none the less liable to the full extent of its means by reason of its being a limited Company, than an individual by reason of his means being limited to that which he possesses.” *Buckley*, 9th Ed. p. 7; *Muir v. Glasgow Bank*, 4 A.C. 337, 381. I

(4) “ One-man Company ”—Legality of.

The requirements of the section would be satisfied in the case of a Company of seven members six of whom are trustees for the seventh. The Act does not require more than a nominal plurality of members, and the “ one-man Company ” is therefore legal. *Salomon v. Salomon & Co.*, (1897) A.C. 22, 45, *reversing Broderip v. Salomon*, (1895) 2 Ch. 328. J

(5) Interest of members in the Company need not be substantial.

(a) There is nothing in the Act as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. *Salomon v. Salomon*, (1897) A.C. 22, 45. K

(b) “ *Salomon's case* has decided that a Company can be legitimately formed under the Companies Act by one person, or one or two persons, with all the rest men of straw, and that there is at present no machinery except winding-up, by which it can be extinguished.” *Per Lindley L.J. In re Hirth*, (1899), 1 Q.B. 612 (620). L

(6) Conveyance to “ one-man Company,” voidable, if fraudulent.

But though a “ one-man Company ” is legal, yet, if a sole trader converts him self into a Company and transfers all his assets to the Company, the transaction may be fraudulent under S. 53 of the Transfer of Property Act (IV of 1882), or it may be impeached as an act of bankruptcy

I.—“Any seven....purpose ”—(Concluded).

under the Bankruptcy Law in case the vendor becomes insolvent. See *Re Hirth*, (1899), 1 Q.B. 612; See, also, *Re Slobodinsky*, (1903), 2 K.B. 525; *Re Ely*, (1900) 48 W.R. 693; *Re Carey*, (1895), 2 Q.B. 624; *Wheatley's Trustee v. Wheatley*, 85 L.T. 491; *E.P. Jeffreys*, (1895) 2 Q.B. 624. M

N.B.—Though S. 53 of the Transfer of Property Act applies only to immoveable property, still the principles underlying that section are applicable to moveable property also, and where a transfer of moveables is made not in good faith, but only as a contrivance to defraud creditors, the transaction can be set aside on general principles of justice, equity and good conscience. See 30 M. 6. M-1

(7) Distinction between public and private Companies—English Law.

(a) The English Companies (Consolidation) Act of 1908, draws a distinction between public Companies and private Companies.

A private Company according to the Act is one which (a) restricts the right to transfer shares, and (b) limits the number of its members (exclusive of the persons in the employment of the Company) to fifty, and (c) prohibits any invitation to the public to subscribe for any shares or debentures of the Company.

(b) In the case of such Companies it is enough if the memorandum is subscribed by two persons. See S. 2, Companies (Consolidation) Act, 1908. N

2.—“By subscribing....incorporated Company.”

(1) Signature by agent orally authorised, valid.

The memorandum may be signed by an agent authorised in this behalf even orally. *Whitley Partners, Limited*, 32 Ch. D. 337. O

(2) Certificate of incorporation—Effect of.

A certificate of incorporation given by the Registrar is conclusive evidence of the fact that all the requisitions of the Act in respect of registration have been complied with. See S. 41, *infra*. P

N.B.—As to the effect of signing the memorandum of Association, see Ss. 11 and 45, *infra*.

(3) Company not bound by agreements before incorporation.

(a) A company is not bound by any agreement entered into on its behalf before it comes into existence, and as a Company is not in existence at the date of preparing the memorandum and articles, the costs of preparing these cannot be recovered from it. *English and Colonial Co.*, (1906) 2 Ch. 485. Q

(b) Even by subsequent ratification a Company cannot be bound by any such contract entered into before its incorporation. *Kelner v. Baxter*, (1866) 2 C.P. 164. R

(c) But it may enter into a new contract embodying the terms of the old one. *Re Dale and Plant*, (1889) 61 L.T. 206; *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A.C. 120. S

(d) Or it may enter into a new contract adopting the old one. See *Evans and Cooper*, p. 94. T

7. The liability of the members of a Company formed under this Act may, according to the memorandum of association, be limited ¹ either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the Company in the event of its being wound up.

Where a Company is formed as a Limited Company, the liability of the directors or managers of such Company, or of the managing director, may, if so provided by the memorandum of association, be unlimited.

(Notes).

General.

Corresponding English Law.

The first paragraph of this section corresponds, in substance, to sub-sections (i) and (ii) of S. 2 of the English Companies (Consolidation) Act, 1908. The English Act also contains the words "in this Act termed a company limited by shares" within brackets after the words "respectively held by them," and also the words "in this Act termed a Company Limited by guarantee" within brackets after the words "in the event of its being wound up." The second paragraph of this section corresponds to the first paragraph of S. 60 the English Act, 1908, *verbatim*.

I.—"The Liability....limited."

(1) Limited liability—Object of.

"Limited liability has been permitted in favour of share-holders and the means prescribed for limiting it must be strictly followed." Buckley, 9th Ed., p. 7. U

(2) Limitation of liability by memorandum—Not to be restricted by articles.

Any limitation by the articles of the liability of the members in a way inconsistent with the memorandum and to the prejudice of creditors is void. *Dent's case*, 15 Eq. 407; 8 Ch. 768, 775. Y

N.B.—But the articles may extend the liability of members beyond the limit fixed by the memorandum, to provide for the payment of a particular debt. *Maxwell's Case*, 20 Eq. 585; *Mc Kewan's Case*, 6 Ch.D. 447. Y-1

(3) Distinction between a limited Company and a partnership.

(a) A Limited Company is a body corporated and is, in the eye of law, a distinct person, different altogether from the individuals composing it. *Salomon v. Salomon*, (1897) A.C. 22; *Kodak Ltd. v. Clark*, (1903), 1 K.B. 505; whereas a firm is not a distinct person; it is made up of the several partners composing it. See Topham, 2nd. Ed. p. 5. W

(b) Hence a Limited Company can hold and deal with property, and sue, and be sued in its own name and enter into contracts in its own behalf. The members are not personally entitled to the benefits or liable for the burden arising thereby. Their rights are confined to, receiving from the company their share of the profits, or after a winding up of the surplus assets. *Gore Brown & Jordon*, 30th Ed., p. 3. X

I.—“The liability....limited”—(Concluded).

- (c) Each partner is personally liable for all the debts contracted by the firm. But the members of a Limited Company are not individually liable to its creditors for the debts contracted by the Company. They are only liable to the Company and their liability is limited to the amount unpaid on their shares or to the amount fixed by the guarantee as the case may be. (*ibid.*) X-1
- (d) A share holder can, subject to the regulations of the Company, transfer his shares to anybody without the consent of the other members. But a partner cannot transfer his interest in the firm without the consent of the other partners. Topham, 2nd Ed., p. 6. Y
- (e) A share-holder is not an agent of the Company of which he is a member, but a partner is an agent of the firm for making contracts. See Topham, 2nd Ed., p. 7. Z
- (f) Partners can make any private arrangements they like among themselves concerning the business of the firm, while there are some arrangements which a Company is prohibited from making, such as the purchase by it of its own shares. (*Ibid.*)

8. Where a Company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a Company limited by shares, the memorandum of association shall contain the following things (that is to say):—

Memorandum
of association of a
Company limited by
shares.

- (a) the name of the proposed Company with the addition of the word “limited” as the last word in such name ¹;
- (b) the part of British India in which the registered office of the Company is proposed to be situate ²;
- (c) the objects for which the proposed Company is to be established ³;
- (d) a declaration that the liability of the members is limited;
- (e) the amount of capital with which the Company proposes to be registered divided into shares of a certain fixed amount ⁴;

Subject to the following regulations:—

- (f) that no subscriber shall take less than one share;
- (g) that each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes ⁵.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 3 of the Companies (Consolidation) Act, 1908.

1.—“The name....such name.”

(1) Memorandum—Nature of.

The memorandum of association of a Company is its charter, and fixes the limits and extent of its powers. *Ashbury Rail, Carriage and Iron Co. v. Riche*, L.R. 7 H.L. 688. A-1

(2) Importance of the name of Company.

The name of the Company may be important in construing the objects defined in the memorandum of association. *Re Crown Bank*, 1890, 44 Ch. D. 684; *Stephans v. Mysore Reefs*, (1902) 21 Ch. 745. B

(3) Name not to be identical with that of a subsisting Company.

The name of the Company should not be identical with that of a subsisting Company or so nearly resembling the same as to be calculated to deceive, except where such subsisting Company is in the course of being dissolved and testifies its consent in such manner as the Registrar requires. See S. 41, *infra*, and notes under that section. C

(4) Words implying Royal patronage not to be used without permission.

A Company should not without the consent of the Home Secretary use as part of its name, words implying Imperial or Royal patronage such as “Royal,” “Crown,” “Queen,” “His Majesty’s” “Her Majesty’s” &c. See Evans and Cooper p. 4; Nicols and Lawrence, 3rd Ed., p. 25.D

(5) Publication of Company’s name.

Every Limited Company should paint or affix its name on the outside of every office or place of business, and its name must appear in legible characters in all notices, advertisements, bills, invoices, receipts, etc. See S. 65, *infra*. E

(6) Associations not for profit may be permitted to omit the word ‘limited.’

An association formed for some purpose other than gain may, on obtaining a license from the Local Government, be registered, with limited liability without the addition of the word ‘limited’ to its name. See S. 26, *infra*. F

2.—“The part....situate.”

(1) Carrying business without registered office, prohibited.

Every Company under the Act shall have a registered office to which all communications and notices may be addressed. A Company that carries on business without such registered office incurs a penalty of Rs. 50, for every day during which the business is carried on. See S. 63, *infra*. G

(2) Notice of situation of Registered office.

Notice of the situation of the Registered office and of any change therein shall be given to the Registrar. See S. 64, *infra*. H

3.—“The objects....established.”

(1) Objects of the Company should not be illegal.

The object of a Company should not be the doing of anything illegal, immoral or contrary to public policy. Thus, the memorandum cannot empower a Company to pay dividends out of capital, or to issue shares at a discount, or purchase its own shares. See *Trevor v. Whitworth*, (1887), 12 A.C. 409; *Guinness v. Land Corporation of Ireland*, (1882), 22 C. D. 849; *Oorugam Gold Mining Co. of India v. Royer*, (1892), A.C. 125.I

3—"The objects....established"—(Continued).

(2) Objects to be specified clearly.

- (a) The objects must be set out with reasonable clearness. A mere stringing together of a large number of very wide powers is not a compliance with the section. *In re German Date Coffee Co.*, (1882), 20 C.D. 169. See, also, *Re Fraser Ltd.*, W.N. (1903), 73. J
- (b) The requirements of this clause are not complied with if the memorandum merely states that the object of the proposed Company is to carry on any business which may appear to it to be profitable. *Crown Bank*, 44 Ch. D. 634; *Stephens v. Mysore Reefs*, (1902), 1 Ch. 745. K

(3) Company's powers limited to objects specified in Memorandum—Doctrine of *ultra vires*.

- (a) The powers of a Company to transact business are restricted to the objects specified in the memorandum. Any act which is beyond the objects thus specified is *ultra vires* and void. *Ashbury Carriage Co. v. Riche*, (1875), 7 H.L. 653. L
- (b) A Statutory Corporation....created for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined in the Act. *Per Lord Cranworth in Eastern Counties Railway v. Hawkes*, (1885), 5 H.L.C., 331. M

(4) Contract *ultra vires* the memorandum, void.

- (a) A contract which is *ultra vires* the memorandum is wholly void and cannot be rendered valid as against the corporation even though it is assented to by every individual member of the corporation. *Wenlock v. River Dee Co.*, 36 Ch. D. 674, 681 N, 686 N; see, also, *Ashbury Co. v. Riche*, L.R. 7 H.L. 653 (672). *Towers v. African Trug*, (1904), 1 Ch. 566. N
- (b) A contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company which is in excess of its powers, cannot be specifically enforced. See Specific Relief Act (I of 1877), S. 21 (f). O
- (c) A consent decree obtained against a Company and embodying the terms of an *ultra vires* contract is as invalid as the contract itself and can be set aside. *G.N.W.C. Railway Co. v. Charlebois's*, (1899), A.C. 114. P

(5) Liability of Directors for acts *ultra vires* the memorandum.

The directors are personally liable for any loss the Company may sustain by reason of acts done by them, not warranted by the memorandum of association. 18 B. 119. Q

N.B.—The Company does not incur any liability in respect of such acts. 7 B.L.R. 588.

(6) Reason of the doctrine of *ultra vires*.

- (a) The rule is intended for the protection of future share-holders, and creditors of the Company. "The provision under which the system of limited liability was inaugurated were provisions not merely for the benefit of existing share-holders but were also intended to secure the interests of future share-holders, and the creditors of the companies." *Per Lord Cairns in Ashbury Railway Carriage Co. v. Riche*, (1875), 7 H.L. at p. 667. R

3.—“The objects....established”—(Continued).

- (b) “You must state the objects for which you are associated, so that the persons dealing with you will know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose.” *Per Lord Hatherley in Ashbury Railway Carriage Co. v. Riche*, (1875), L.R. 7 H.L. at p. 684. **S**

(7) Memorandum—Generally unalterable.

The memorandum of association is the fundamental and, except in certain specified particulars, the unalterable law of Companies incorporated in virtue of it. *Per Lord Selborne, Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. at p. 698; See, also, S. 12, *infra*. **T**

(8) Memorandum not to be controlled by articles.

- (a) “The memorandum cannot be so qualified by the articles as to reserve powers to extend or change the business or objects of the Company by means of a special resolution.” *Per Archibald, J. (Ibid.)* See, also, *Dent's case*, 15 Eq. 407 = 8 Ch. 768. **U**

- (b) If the memorandum of association expressly or impliedly prescribes equality among the share-holders, the articles of association, even though contemporaneous, cannot override the memorandum in this particular. *Andrew v. Gas Meter Co.*, (1897), 1 Ch.D. p. 361. **Y**

(9) Doctrine of *ultra vires* to be applied reasonably.

But though any act which is *ultra vires* the memorandum, is void, anything fairly incidental to the objects as defined is not, unless expressly prohibited, to be held as *ultra vires*. *A-G v. Great Eastern Railway*, 11 Ch. D. 449, 480; 5 A.C. 479; *L. & N.W. Railway Co. v. Price*, 11 Q.B.D. 485; *Foster v. L.C. D. Ry.* 1895; 1 Q.B. 711; *A-G v. London County Council*, (1901), 1 Ch. 781; (1907) A.C. 165; *A-G, v. N. E. Railway* (1906), 2 Ch. 675; *A-G v. Mersey Railway* (1907) 1 Ch. 81; (1907) A.C. 415; *Guinness v. Land Corporation of Ireland* (1882), 22 C.D. 349; 14 C. 189. **W**

(10) Examples.

- (a) A Company formed to work a patent may purchase the patent. *Lief-childs' case*, (1865), 1 Eq. 231. **X**
- (b) Where a Company acquired a piece of land for the purposes of its railway and erected railways on arches, *held*, it could let the arches as workshops, &c., *Foster v. London, Chatham and Dover Railway Co.*, (1895), 1 Q.B. 711; see, also, *Ex parte Horsey* (1868), 16 W.R. 535; *Simpson v. Westminster Palace Hotel Co.*, (1860), 8 H.L.C. 712. **Y**
- (c) Where the objects of a Company were stated to be the purchase of the business of a hotel-keeper, confectioner and provisioner, the future working and carrying on of the said business and the doing of all such other things as were incidental or conducive to the attainments of the above objects, *held*, the directors had power to bind the Company by the issue of negotiable securities in the ordinary course of business. 1 B.L.R. (O. C.) 14. **Z**
- (d) A trading Company has generally, as incidental to its main objects, the power of borrowing money, mortgaging and selling property, paying commissions to brokers for disposing of shares, giving gratuities to workmen to form a reserve fund, &c. *Nicolas & Lawrence*, 3rd Ed., pp. 28, 29, 30. **A**

3—"The objects...established"—(Concluded).

(11) Acts, not incidental to the main object—Examples.

(a) A Company having power to run tramways cannot run omnibusses to feed the tramways. *London County Council v. Attorney-General*, (1902), A.C. 165. **B**

(b) A Life Assurance Company cannot undertake the business of marine insurance. *Re Phoenix Life Assurance Co.*, (1862) 2 J. & H. 411. **C**

(12) Articles may explain or supplement memorandum.

"If the memorandum is ambiguous or silent on a matter which the Act does not require to be stated therein, contemporaneous articles may be looked at to explain its meaning or to control or rebut an inference which might otherwise be drawn from its silence." *Lindley on Companies*, 6th Ed., Vol. I, p. 163. **F**

(13) Acts *ultra vires* the articles—Effect of.

An act which is within the Memorandum, but forbidden by the articles, may be ratified by the share-holders. *Irvine v. Union Bank of Australia*, (1877), 2 A.C. 388. See, also, *Spackman v. Evans*, L.R. 3 H.L. 171; *Evans v. Smalcombe*, L.R. 3 H.L. 249; *Houldsworth v. Evans*, L.R. 3 H.L. 263; *Dixon v. Evans*, L.R. 5 H.L. 606; *Phosphate of Lime Co. v. Green*, L.R. 7 C.P. 43; *Campbell's Case*, 9 Ch. 1. **E**

(14) Company to be wound up on failure of its objects.

An association formed for a particular purpose must be put an end to if that purpose fails, and it does not matter that it has large powers in addition to that particular purpose. In *re Red Rock Gold Mining Co.*, (1889), 61 L.T. at p. 787. See, also, *Re Coolgardie Consolidated Gold mines, Ltd.*, (1897), 76 L.T. 269; *Re Amalgamated Syndicate*, (1897), 2 Ch. 600; *Re Haven Gold Mining Co.*, (1881), 20 C.D. 151; *Re Crown Bank*, (1890), 44 C.D. 634; *Re German Date Coffee Co.*, (1892), 20 Ch. D. 169. **F**

(15) General words in memorandum—How construed.

(a) General words in the memorandum which when construed literally may mean anything "must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a Company for manufacturing one thing into a company for importing something else, however general the words are." *Per Lindley, L.J.*, *Re German Date Coffee Co.*, (1882), 20 C.D. 169. See, also, *Stephens v. Mysore Reefs*, (1902), 1 Ch. 745; *Pedlar v. Road Block Mines*, (1905), 2 Ch. 427. **G**

(b) The memorandum of association of a Company authorized the Company to acquire gold mines 'in Mysore and elsewhere'; the Company gave up the mining operations in Mysore; it was held, that the provision for the acquisition of gold mines 'elsewhere' would not enable it to work mines on the Gold Coast. *Stephens v. Mysore Reefs*, (1902), 1 Ch. 745. See, also, *Pedlar v. Road Block Gold Mines Limited*, (1905), Ch. 427. **H**

(c) In spite of a statement in the objects clause that each paragraph is to be read independently and is not to be limited by the terms of other paragraphs, if the main object is set forth in one paragraph, the other paragraphs will be read only as ancillary to it. *Stephens v. Mysore Reefs*, (1902) 1 Ch. 745. **I**

4.—“The amount of capital....amount.”

(1) Amount of capital.

The Act places no limit on the amount of capital with which a Company may be registered. But in determining the amount of capital it is well to bear in mind that there is “enough to provide the Company with sufficient working capital. Lack of such capital will probably result in an early dissolution. On the other hand, the capital should not be larger than is requisite; for, if larger than necessary, the profits per share will be diminished, and stamp duties will be unnecessarily paid.” See Nicolas and Lawrence, 3rd Ed., p. 35. J

N.B.—As to the meaning of the word ‘share’ see notes under S. 29, *infra*.

(2) Shares may be of any amount.

There is no minimum fixed as to the amount of each share. The shares may be of the smallest nominal value. *Salomon v. Salomon and Co.*, (1897) A.C. 22, 45, reversing *Broderip v. Salomon*, (1895), 2 Ch. 323. K

(3) Different classes of shares.

- (a) The capital may be divided into shares of different classes, the holders of each class, being entitled to different rights as to dividends, return of capital in a winding up, voting or otherwise. See S. 27 (a), *infra*. L
- (b) If the rights of the different classes of share-holders are stated in the memorandum, they cannot subsequently be altered. See *Ashbury v. Watson*, (1885), 30 Ch. D. 376. M
- (c) Even if the memorandum states that the rights of the different classes of share-holders shall be such as are defined by the Articles, the defining clause of the Articles must be treated as part of the memorandum, and becomes as unalterable as the memorandum itself. *Collins v. Birmingham Breweries, Ltd.*, (1899), 15 T.L.R. 180. N
- (d) But they can be altered if the memorandum itself reserves power to alter them. *Welsbach Co.*, (1904), 1 Ch. 87. O
- (e) If the rights of share-holders are defined by the Articles, they can, it seems, be altered under S. 76, *infra*. See *Andrews v. Gas Meter Co.*, (1897), 1 Ch. 361. P

5.—“Each subscriber....takes.”

(1) Subscriber, to take shares from the Company.

A person who subscribes the memorandum for a certain number of shares, is bound to take the shares from the Company and pay for them. His obligation is not discharged by taking fully paid-up shares from another member. 13 B. 57. Q

(2) Qualification shares of directors need not be purchased from the Company.

Shares taken as a qualification for the directorship of a Company need not be taken from the Company itself. It is enough if they are obtained, in open market or from a friend, within a reasonable time after the acceptance of office. They need not be shares for which the qualifying director has paid. 13 Bom. 1. See, also, *Brown's case*, L.R. 9 Ch. Ap. 102. R

9. Where a Company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the Company in the event of the same being wound up (hereinafter referred to as a Company limited by guarantee), the memorandum of association shall contain the following things (that is to say):—

Memorandum of association of a Company limited by guarantee.

- (a) the name of the proposed Company, with the addition of the word "limited" as the last word in such name ;
- (b) the part of British India in which the registered office of the Company is proposed to be situate ;
- (c) the objects for which the proposed Company is to be established ;
- (d) a declaration that each member undertakes to contribute to the assets of the Company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company contracted before the time at which he ceases to be a member, and of the costs, charges and expenses of winding-up the Company and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

(Note).

(General).

Corresponding English Law.

This section corresponds to S. 4, cl. 1 of the English Companies (Consolidation) Act, 1908—

10. Where a Company is formed on the principle of having no limit placed on the liability of its members (hereinafter referred to as an unlimited Company), the memorandum of association shall contain the following things (that is to say):—

Memorandum of association of an unlimited Company.

- (a) the name of the proposed Company ;
- (b) the part of British India in which the registered office of the Company is proposed to be situate ;
- (c) the objects for which the proposed Company is to be established.

(Notes).

(General).

Corresponding English Law.

This section corresponds to S. 5, cl. 1 of the English Companies (Consolidation) Act, 1908.

11. The memorandum of association shall be signed¹ by each subscriber in the presence of, and be attested by, one witness at the least². It shall, when registered, bind the Company and the members³ thereof to the same extent as if each member had subscribed his name thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors and administrators, a contract to observe all the conditions of such memorandum subject to the provisions of this Act.

(Note).

(General).

Corresponding English Law.

This section corresponds to S. 6 of the English Companies (Consolidation) Act, 1908.

1.—“ *The memorandum....signed.* ”

(1) Signature includes ‘ mark.’

“ Sign ” with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name include “ mark ” with its grammatical variations and cognate expressions. General Clauses Act X of 1897, S. 3 (52). **S**

(2) Effect of signing memorandum.

The subscribers of the memorandum shall be deemed to have agreed to become members of the Company, and upon the registration of the Company shall be entered as members in the register of members. See S. 45, *infra*. **T**

(3) Signature of articles.

If the Company is registered with articles of association, the articles must be signed in the same manner as the memorandum. See S. 39, *infra*. **U**

(4) Signature obtained through fraud of promoter—Effect of.

A person who has signed the memorandum cannot as against the company obtain a rescission of the contract to take shares, on the ground that his signature was obtained through the fraud of a promoter, for when he signed the memorandum, the Company was not in existence and therefore could not be a party to the fraud. *Lord Lurgan's case*, (1902), 1 Ch. 707. **Y**

2.—“ *And be attested....least.* ”

(1) Attestation of all signatures by one witness.

Form A, in Sch. II contemplates one witness attesting at the foot of the memorandum the signatures of all the subscribers. 17 B. 472. **W**

(2) Language of the section—Peculiarity of.

The language of the section which follows the English Act, is somewhat peculiar. In its strict grammatical sense it would mean that the memorandum of association shall be attested by one witness at the least, not that the signature of each subscriber, shall be attested by one witness at the least. (*Ibid.*) **X**

3.--"It shall....company and the members."

(1) Number of shares that may be taken.

The Act places no limit on the number of shares that may be held by a single member, nor does it require that the subscribers should have a substantial interest in the undertaking. *Salomon v. Salomon & Co.*, (1896), A.C. 22. Y

(2) Liability of share-holder to pay for shares.

A share-holder is liable to pay for the shares in money, or if there is a registered contract, in money's worth. See S. 28, *infra*; also *Baglan Hull Colliery Co.* (1870), 5 Ch. App. 386. Z

(3) Subscriber's liability not affected by non-attestation.

Non-attestation of a subscriber's signature may be a valid objection to the registration, but if registration has taken place, a subscriber cannot escape his liability to the company as a member on the ground that his signature to the memorandum has not been attested. The transaction may have been irregular, but is not void. 17 B. 472. A

(4) Power to appoint first directors.

Some times, power is given to the subscribers to appoint the first directors and until they exercise the power, they themselves act as directors. See *Evans & Cooper*, p. 11. B

(5) Stamp duty on memorandum.

(a) The memorandum should bear a stamp of Rs. 15 if accompanied by articles of association under S. 37, *infra*. If not so accompanied it should bear a stamp of Rs. 40. But the memorandum of association of a Company not formed for profit, and registered under S. 26, *infra*, need not bear any stamp. See Indian Stamp Act, II of 1899, Sch. I, Art. 39. C

(b) Under the English Law, the memorandum must bear the same stamp as if it were a deed. See S. 6 of the English Companies (Consolidation) Act (1908). D

12. Any Company limited by shares may so far modify the con-

Power of certain Companies to alter memorandum of association.

ditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital ¹, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock ²; but, save as aforesaid, and save as hereinafter provided, no alteration shall be made by any Company in the conditions contained in its memorandum of association ³.

(Notes).

(General).

Corresponding English Law.

See sections 7 and 41 cl. 1 (a), (b) & (c) and 2 of the English Companies (Consolidation Act), 1908.

1.—“Any company...increase its capital.”

(1) Increase of capital, to be authorised by articles.

The power to increase must be contained in the regulations. A power conferred by the memorandum is ineffectual and an increase made in exercise of that power is void. Re *Derine Co.*, (1903), W.N. 82. E.

(2) Increase of capital—Form of.

(a) “The statute does not prescribe any particular form in which this (i.e.; the increase of capital) is to be done.” Per Lord Selborne in *Campbell's Case*, (1873), 9 Ch. App. 1 (21). F

(b) “The articles may require a special or extraordinary resolution, or may give the directors the power of increasing the capital with or without the sanction of a general meeting. If the articles do not require a special or extraordinary resolution, an ordinary resolution is all that is necessary.” Evans & Cooper p. 52. G

(c) Where the articles require “the sanction of a special meeting of the Company, passed at a general meeting,” a resolution passed at a general meeting of the Company is not sufficient. 18 B. 152. H

(d) A person cannot be made liable as the holder of shares in the increased capital of a Company, unless the increase of capital has been made in accordance with the regulation of the Company. (*Ibid.*) I

(3) Procedure where Regulations do not authorize increase.

If the regulations do not authorize an increase, a special resolution should be passed to take power, but two such resolutions are not necessary—one to alter the articles and the other to increase the capital. *Campbell's case* (1873), 9 Ch. App. 1. See, also, *Taylor v. Pilsen Joel Co.*, 27 Ch. D. 268. J

(4) Substantial compliance with section—Sufficiency of.

“The powers given by the section are well exercised whenever the things authorized are in substance done by those who are by the Statute made competent to do them.” Per Selborne, in *Campbell's case*, L. R. 9 Ch. 1 (21). K

(5) Increase of capital by issue of preference shares, when valid.

Where the memorandum does not forbid it, an increase may be effected by the issue of preference shares. *Andrews v. Gas Meter Co.*, (1897), 1 Ch. 361. L

(6) Increase not to affect rights of share-holders *inter se*.

An increase cannot be so effected as to create shares which would disturb the rights of different classes of share-holders as determined by the memorandum, unless the memorandum itself confers powers to vary those rights. See *Ashbury v. Watson*, (1885) 30 Ch. D. 376; *Underwood v. London Music Halls*, (1901), 2 Ch. 309; *Welsbach Incandescent Gas Co.*, (1904) 1 Ch. 87. M

(7) Notice of increase to be given to Registrar.

Notice of any increase of share capital beyond the registered capital must be given to the Registrar within fifteen days after the passing of the resolution authorizing the increase. Default in complying with this requirement renders the Company and every Director and Manager wilfully authorizing or permitting the default liable to a penalty not exceeding Rs. 100 a day. See S. 57, *infra*. N

1.—“Any company....increase its capital”—(Concluded).

(8) Notice of consolidation etc.

Similarly notice of consolidation of share capital, of conversion of shares into stock, and of re-conversion of stock into shares must be given to the Registrar. See S. 51, *infra*. O

2.—“To consolidate....stock.”

(1) Effect of conversion of shares into stock.

After conversion and notice to the Registrar all the provisions of the Act which are applicable to shares only shall cease as to so much of the capital as is converted into stock; and the register of members of the Company, and the list of members to be forwarded to the Registrar shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares herein before required by the Act. See S. 52, *infra*. P

(2) Stock and shares compared.

- (a) “Shares are not necessarily paid up. They may exist as either paid up or not paid up shares and they are not necessarily converted into stock when they are paid up. But stock can only exist in the paid up state.” *Per Lord Hatherley in Morrice v. Aylmer*, (1875) 7 H.L. 717. Q
- (b) “Shares in a Company, as shares, cannot be bought in small fractions of any amount; but the consolidated stock of a company can be bought just in the same way as the stock of the public debt can be bought, split up into as many portions as you like, and sub-divided into as small fractions as you please.” *Per Lord Hatherley in Morrice v. Aylmer*, (1875) 7 H.L. 717 (724, 725). R

N.B.—But “independently of that, it possesses all the qualities of shares. It is in fact simply a set of shares put together in a bundle.” (*Ibid.*)

(3) Incidents common to stocks and shares.

- (a) “Stock is ordinarily transferable in the same manner as shares, but sometimes a minimum amount of transferable stock is fixed.” *Evans & Cooper*, p. 54. S
- (b) “Stock-holders have usually the same right as regards dividends and voting as share-holders.” (*Ibid.*) T
- (c) “Preference and other rights in respect of shares are not affected by their conversion into stock.” (*Ibid.*) U
- (d) “Warrants to bearer may be issued in respect of stock.” (*Ibid.*) V

3.—“Save as aforesaid....association.”

(1) Memorandum not generally alterable.

- (a) The memorandum of association is the fundamental and except in certain specified particulars, the unalterable law of the Companies registered in virtue of the Act. *Ashbury Rail Carriage Co. v. Riche*, L.R. 7 H.L. 668: See, also, *Dent's Case*, 15 Eq. 407=8 Ch. 768. W
- (b) The provisions of the memorandum cannot be altered even in pursuance of a power in this behalf conferred by the memorandum itself. See *Evans & Cooper*, p. 6. X
- (c) Anything inserted in a memorandum, though it is not a thing required, to be stated therein is a “condition” and cannot be altered. *Ashbury v. Watson*, (1885), 80 Ch. D. 381. Y

3.—“*Save as aforesaid...association*”—(Concluded).

- (d) Thus, although a condition inserted in the memorandum of association that A & B, and their heirs etc., shall be secretaries of a Bank, is not one of the things which under S. 8, a memorandum of association is bound to contain, nevertheless, the restrictions placed by this section upon modification of the conditions contained in the memorandum of association apply to this condition also. 5 M.L.T. 290. See, also, *Ashbury v. Watson*, 30 Ch. D. 376. **Z**
- (e) Similarly, if the memorandum expressly or impliedly prescribes equality among the shareholders, the articles of association, even though contemporaneous, cannot override the memorandum in this particular. *Andrew v. Gas Meter Co.*, (1897), 1 Ch. D. p. 361. **A**
- (f) Any provision in the articles which purports to empower the Company to alter the memorandum or to do anything not authorized by the memorandum is wholly void. *Riche v. Ashbury Rail Carriage Co.*, L.R. 9 Ex. 224; 7 H.L. 653; See, also, *Dent's Case* 15 Eq. 407 = 8 Ch. D. 768; *Ashbury v. Watson*, (1885), 30 C. D. 376. **B**

N.B.—As to acts that are *ultra vires* the memorandum, and as to the application of the doctrine of *ultra vires*, see notes to S. 8 *supra*.

(2) Articles may be altered.

- (a) Ordinarily, anything which appears in the articles of association, but is not provided for in the memorandum of association may be altered by special resolution under S. 76 of the Act. 5 M.L.T. 290 (292). **C**
- (b) Where the memorandum of association contained a condition that A & B and their heirs, executors and administrators were to be secretaries, but the emoluments and powers of the secretaries were set out in the articles of association, *held*, that that portion of the articles of association could not be read as part of the memorandum of association so as to preclude its alteration by special resolution under S. 76. 5 M.L.T. 290 (292). **D**

Reduction of Capital and Shares.

13. Any Company limited by shares ¹ may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed, or as altered by special resolution, as to reduce its capital ²; but no such resolution for reducing the capital of any Company shall come into operation until an order of the Court is registered ³ by the Registrar of Joint Stock Companies, as is hereinafter mentioned.

Explanation I.—The word “capital” includes paid-up capital.

Explanation II.—The power to reduce capital conferred by this section includes a power to cancel any lost capital, or any capital unrepresented by available assets, ⁴ or to pay off any capital which may be in excess of the wants of the Company ⁵; and paid-up capital may be reduced either with or without extinguishing

or reducing the liability (if any) remaining on the shares of the Company; and, to the extent to which such liability is not extinguished or reduced, it shall be deemed to be preserved, notwithstanding anything hereinafter contained.

(Notes).

General.

This section corresponds to S. 46 of the English Companies (Consolidation) Act of 1908, though the wording is somewhat different. S. 46 of the English Act states "subject to confirmation by Court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its capital in *any way etc.*" The insertion of the words "in any way" in that section merely gives statutory recognition to the decision in *Poole v. National Bank of China* (1907 A.C. 229). and in spite of the difference of language, it is conceived that the powers of reduction under S. 13 of the Indian Act are as wide as those under S. 46 of the English Act. **E**

1.—"Any company limited by shares."

(1) Application of the section.

This section applies only to companies limited by shares and does not apply to unlimited companies or to companies limited by guarantee. **F**

(2) Reduction of capital by unlimited companies.

(a) Unlimited companies registered under the Act and having a capital divided into shares can reduce their capital in any manner which their memorandum and articles of association permit. *Borough Commercial Society*, 1893, 2 Ch. 242. **G**

(b) Such companies need not state in the memorandum, the amount of capital with which they propose to be registered. The amount of capital should be stated only in the articles of Association. See Ss. 10 and 37. **H**

(3) Reduction of capital by Company limited by guarantee—Difference between English and Indian Law.

The Act contains no provision for the reduction of capital by a Company limited by guarantee. Such Companies, it is conceived, cannot reduce their capital. The English law is different. S. 56 of the Companies, (Consolidation) Act (1908) provides that a Company limited by guarantee registered since 1901 and having a share capital may increase or reduce its share capital in the same manner and subject to the same conditions, as a Company limited by shares. **I**

2.—"May, by special resolution....as to reduce its capital."

N.B.—For the definition of "special resolution," See S. 77, *infra*.

(1) Reduction to be authorized by regulations.

A Company can reduce its capital only when it is empowered to do so by its regulations. A power to reduce, contained in the memorandum of association, but not in the regulations is ineffective. *Dexine Rubber Co.*, (1903), W.N. 82. **J**

2.—“*May, by special resolution....to reduce its capital*”—(Concluded).

(2) Procedure where regulations do not authorize reduction.

If the regulations do not empower a Company to reduce its capital, two special resolutions must be passed before a reduction can be effected :—One special resolution altering the regulations so as to take power to reduce, and a subsequent special resolution reducing the capital. See *John Crossly and Sons*, 1892, W.N. 55 ; *Patent Invert Sugar Co.*, 1886, 31 Ch. p. 166. K

N.B.—If there are not two such resolutions, the Court has no jurisdiction to confirm the reduction. *West Indian and Pacific Steamship Co.*, 9 Ch. 11 n ; See also *Patent Invert Sugar Co.*, 31 Ch. Div. 166.

(9) Mode of effecting reduction.

(a) A reduction of capital may be effected in any manner which may seem expedient, and the Act does not prescribe any particular form for effecting it. The wording of the section is general and is applicable to every possible mode of reducing capital. See *British Finance Corporation v. Cooper*, (1894) A.C. 399, 403. See, also, *Credit Assurance and Guarantee Corporation* (1902), 2 Ch. 601 ; *Phoebe Gold Co.*, 1900, W.N. 182. L

(b) All questions as to the mode, extent and incidence of reduction are left to be determined by the Company itself, subject to the confirmation of the Court. *British Finance Corporation v. Cooper*, (1894), A.C. 399. M

3.—“*No such resolution....is registered.*”

(1) Jurisdiction of Court to sanction reduction, when arises.

(a) The cases referred to in the Explanation II, are not exhaustive, and the jurisdiction of the Court arises whenever the Company has passed a special resolution for reduction and does not depend on proof that capital is lost, is unrepresented by available assets, or is in excess of the wants of the company. See the judgment of Lord Macnaghten in *Poole v. National Bank of China*, (1907) A.C. 229. N

(b) The Court may sanction any scheme for reduction though it may involve the doing of things which, but for such sanction would be entirely forbidden, such as the purchase by the Company of its own shares, or a re-arrangement of the rights of the members. See *British and American Trustee Corporation v. Cooper* (1894), App. Ca. 399 ; *Credit Assurance and Guarantee Corporation*, (1902), 2 Ch. 601. O

(c) Buckley, however, says that notwithstanding the opinion of Lord Macnaghten in *Poole v. National Bank of China*, Courts still require evidence of loss of capital if the reduction is based upon an allegation of loss. See Buckley, 9th Ed., p. 133. P

(2) Power of the Court to sanction reduction, discretionary.

(a) Though the jurisdiction of the Court arises whenever the Company passes a special resolution for effecting a reduction still, the power of the Court to sanction a reduction is a discretionary one, and the Court may refuse its sanction to any scheme which may not seem fair and equitable to it. See S. 15, *infra*. Q

3.—“No such resolution is....registered ”—(Concluded).

- (b) The Court may refuse to sanction a scheme for reduction based on loss of capital, where the loss is not clearly proved, and no good cause is shown for the reduction. *Barrow Steel Co.*, 1900. 2 Ch. 846; *on appeal* 1901, 2 Ch. 746. But see *Poole v. National Bank of China* (1907) A.C. 229. R
- (c) Even in cases where the Court accords sanction, it may impose such conditions as it may think fit. See S. 15, *infra*; See, also, *Pinkney Steamship Co.*, 1892, 3 Ch. 125; *Continental Gas Co.*, 7 Times L.R. 476. S

(3) Principles guiding the discretion of Court in according sanction.

- (a) When the rights of the creditors are not concerned, the questions to be considered are:—
- (1) Ought the Court to refuse its sanction out of regard to the interests of the members of the public who may be induced to take shares in the Company? T
- (2) Is the reduction fair and equitable as between the different classes of share-holders? *Per* Lord Macnaghten in *Poole v. National Bank of China*, (1907) App. Cas. p. 239. T-1
- (b) The Court may therefore refuse its sanction to a scheme under which the interests of the minority of shareholders are not sufficiently protected. See *British Finance Corporation v. Cooper*, (1894) A.C. 399, 406; See, also, *Barrow Steel Co.*, (1900) 2 Ch. 846; (1901) 2 Ch. 746. U

(4) Meaning of capital.

The word capital in the Act may have any one of at least three meanings viz.,:—

- (1) Nominal Capital: the amount named in the memorandum of association say Rs. 100,000 in 10,000 shares of Rs. 10 each.
- (2) Issued capital, say 5000 shares of Rs. 10 each, part of the above nominal capital.
- (3) Paid up capital, say Rs. 25,000, being Rs. 5 per share on each of the above 5000 shares. See Buckley, 9th Ed., p. 135. Y

4.—“The power to reduce....available assets.”

(1) Reduction by cancelling paid-up capital, when can be effected.

To effect a reduction by cancelling paid-up capital it must be shown that the capital cancelled is lost or unrepresented by available assets.

Otherwise “the equilibrium of the balance sheet will be affected to the prejudice of the creditors—for, the debit to the shareholders will be diminished and the credit balance increased so as to justify an increase to profit and loss.” Buckley, 9th Ed., p. 136. W

(2) Examples of available assets.

A reserve fund, a sum standing to the credit of profit and loss account, and the Company's goodwill, are all to be treated as available assets. *Barrow Steel Co.*, (1900), 2 Ch. 846; *On appeal*, (1901), 2 Ch. 746. X

4.—“The power to reduce....available assets”—(Concluded).

(8) Loss on reduction—How to be distributed.

- (a) The loss on a reduction due to loss of capital must be borne by the different classes of share-holders, in the same way as loss is borne in a winding up. *London and New York Investment Corporation*, (1895), 2 Ch. 860, 867; *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. D. 287; *Floating Dock Co. of St. Thomas*, (1895) 1 Ch. 691. Y

N.B.—The Court, however, may sanction any other scheme which it considers fair and equitable. See *Credit Assurance Corporation*, 1902, 2 Ch. 601. Y-1

- (b) A reduction must, in the absence of consent, be so made as to make the several share-holders bear the loss according to their rights *inter se* in respect of capital. *Quebrada Co.*, 40 Ch. D. 363; *Gatling Gun, Limited*, 43 Ch. D. 628; *American Pastoral Co.*, 1890, W.N. 62; *Union Plate Glass Co.*, 42 Ch. D. 513. Z

- (c) Where no shares have preference as to capital over other shares, a reduction of capital in a case of loss should not be so made as to throw the loss on some of the shares to the exclusion of others. *Union Plate Glass Co.*, 42 Ch. D. 513; *Bannatyne v. Direct Spanish Telegraph Co.*, 34 Ch. Div. 287. A

- (d) Thus where there are ordinary shares and also shares with preference as to dividend but not as to capital, the loss on reduction must fall equally on both classes of shares, though the effect will be to give the preference share-holders a lower rate of dividend upon the capital they originally brought into the business. *Bannatyne v. Direct Spanish Telegraph Co.*, (1887) 34 Ch. D. 287. See, also, *Union Plate Glass Co.*, 42 Ch. D. 513. B

- (e) But if the preference shares have priority as to capital whether with or without preference as to dividend, then, the loss on reduction must, in the absence of consent, ought to fall on the ordinary shares to the exclusion of the preference shares. *Floating Dock Co. of St. Thomas*, (1895) 1 Ch. 691; *Agricultural Hotel Co.*, (1891) 1 Ch. 396; *London and New York Investment Co.*, (1895) 2 Ch. 860. C

N.B.—A reduction affecting the preference as well as the ordinary shares may be sanctioned though at the time of the creation of the preference shares, the articles of the Company did not contain any power to reduce. *Barrow Steel Co.*, 39 Ch. D. 582. C-1

5.—“To pay off....want of the Company.”

Reduction by returning excess capital.

- (a) A reduction by paying off paid-up capital on the ground that it is in excess of the wants of the Company may be made though the money so paid-up is required by the Company for employment in its business.

For, “if the Company can borrow the sum on better terms, the capital may be in excess of the amount which it wants as money paid upon shares because it may be preferable to borrow.” *Buckley*, 9th Ed., p. 136. D

5.—“To pay off...want of the Company”—(Concluded).

- (b) A reduction involving the return of capital moneys to some or one only and not to all the share-holders, may be sanctioned if it be fair and equitable. See *Banknock Co.*, 24 Rottie 476; *Galling Gun*, 43 Ch. D. 628; *British Finance Corp. v. Couper*, (1894) A.C. 399 (403); *Credit Assurance Corp.*, (1902) 2 Ch. 601. **E**
- (c) A reduction, therefore, is valid, by which the capital is returned to share-holders, and the money is immediately borrowed by the Company on debentures. *Nixon's Navigation Co.*, (1897) 1 Ch. 872. See also *Lawson Store Co.*, (1897) 1 Ch. 875 N. **F**

Miscellaneous.

(1) Examples of valid reductions.

- (a) A reduction by re-paying the paid-up capital on preference shares out of a fund formed from the profits, in accordance with the provisions of the memorandum and the articles, is valid. *Dicido Pier Co.*, (1891) 2 Ch. 354. **G**
- (b) A reduction is not bad merely because it results in the creation of shares of unequal nominal amounts. *Newbery Vautin Co.*, (1892) 3 Ch. 127; *Pinkney Steamship Co.*, (1892) 3 Ch. 125. **H**
- (c) Thus, where the shares are of the value of Rs. 10, each, fully paid-up and it is proposed to reduce them by 60 per cent., it may be provided that every complete number of five fully paid-up shares should be replenished by two shares of Rs. 10 each, fully paid-up, and every share in a holding of less than 5 or beyond any multiple of 5 should be reduced to 8 sh. **I**
- N.B.**—The Act imposes no obstacle in the way of a Company creating such rights in respect of capital as it thinks proper. See *Barrow Steel Co.*, 39 Ch. D. 582. **I-1**

(2) Invalid reductions.

- (a) A reduction is invalid unless effected in the manner provided by the Act.
- (b) The Court can restrain by injunction any dealing with the capital of a Company which amounts to a reduction not carried out according to the provisions of the Act. *Holmes v. Newcastle Abattoir Co.*, 1 Ch.D. 682; *Hope v. International Financial Society*, 4 Ch.D. 327. *Bannatyne v. Direct Spanish Telegraph Co.*, 84 Ch. D. 287. **J**

(3) Issuing shares at a discount.

- (a) The issuing of shares at a discount is a reduction not authorized by the Act and is illegal, and will not be sanctioned by the Court. *Gore Brown and Jordon*, 30th Ed., p. 308. **K**
- (b) Thus, a reduction by which founders' shares were extinguished, and a larger number of ordinary shares were issued in return, was held invalid, as it involved the issue of ordinary shares at a discount. *Development Co., of Central and West Africa*, (1902) 1 Ch. 547. **L**
- (c) Where a Company has illegally issued shares at a discount, the Court will not sanction a scheme of reduction for extinguishing the remaining liability by writing down the capital. *New Chile Gold Co.*, 38 Ch. D. 475. **M**

Miscellaneous—(Continued).

(4) Paying dividends out of capital.

- (a) Similarly payment of dividend out of the capital is illegal and amounts to a reduction of capital in a manner not authorised by the Act. The Act impliedly, if not expressly, provides that the paid-up capital of the Company shall (subject to loss of which the creditor takes the risk) be retained and kept up as the fund to which creditors are entitled to look, and shall not be returned to share-holders by way of dividend or otherwise. See *National Funds Co.*, 10 Ch. D. 118, 128; *Holmes v. Newcastle Abuttor Co.*, 1 Ch. D. 682. See *Buckley*, 9th Ed., p. 140. N
- (b) *Quære*—Whether such payment would be valid if the memorandum provides that one of the objects of the Company is that a part of the capital should be applied in paying dividends? *Buckley*, 9th Ed., p. 140. O
- (c) Where two Companies are formed one of which is to carry on a certain business, and the other by its memorandum provides for the application of part of its capital to supplement the earnings of the other Company so as to make up a certain rate of return upon that other Company's capital, the transaction is perfectly legal. *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. P
- (d) But, it is doubtful whether a single Company could be formed whose objects in its memorandum are described as being to carry on a certain business, and so far as necessary, to devote some part of its capital, say capital subscribed upon B. shares, to make good a dividend at, say 5 per cent. per annum, upon the A shares, though there are several expressions in the judgments in *Guinness v. Land Corporation of Ireland*, which lead to the inference that a memorandum in the form suggested, would be valid and effectual. *Buckley*, pp. 140, 141. Q

(5) Paying dividends out of revenue without making good waste of capital.

Where the memorandum authorizes the investment of the capital in a wasting property, the payment of dividend out of the revenue without recouping the waste of capital may be valid. *Lee v. Neuchatel Asphalt Co.*, 41 Ch. D. 1. R

N.B.—Payment of dividend out of revenue without making up the loss of capital is not the same thing as paying dividends out of capital. *Buckley*, 9th Ed., p. 140. R-1

(6) Purchase by Company of its shares.

- (a) A purchase by a Company of its own shares though authorised by the memorandum or articles of association is illegal and is a reduction in a manner not authorized by the Act. See S. 24, *infra*. *Trevor v. Whitworth*, 12 A.C. 409. S
- (b) Any provision in the articles purporting to empowering a Company to purchase its own shares is in contravention of the Act and is void. *Trevor v. Whitworth*, 12 A.C. 409. See, also, *Gen Property Investment v. Matheson*, Ct. of Sess. Cases, fourth series, Vol. XVI, p. 282. T

N.B.—But though a Company is prohibited from purchasing its own shares, a reduction of capital which is duly sanctioned by the Court and which in accordance with the provisions of the Act in other respects, is valid, though it may involve a purchase by the Company of its own shares. See *British and American Trustee Corporation v. Cooper*, (1894) App. Ca. 416. T-1

Miscellaneous—(Continued).

(7) Cancellation of allotted shares.

- (a) It is beyond the powers of directors to cancel shares duly allotted to a share-holder at his request. Such a cancellation amounts to a reduction not authorised by the Act, and is illegal. 20 B. 654 (657). **U**
- (b) A transaction which results in the extinguishment of the shares of a Company is virtually a reduction of capital, and is illegal unless carried out in accordance with the provisions of this section. 18 B. 152. **V**

(8) Return of paid-up Capital.

- (a) A return to share-holders of a part of the paid-up capital upon the terms that the portion returned should not be re-called, and that the members should retain the same, is not valid. See *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349. 375, *Flitcroft's case*, 21 Ch. D. 519, 533; *Trevor v. Whitworth*, 12 A.C. 409. **W**

N.B.—But a reduction of capital involving a return to share-holders of part of paid-up capital on condition that it may again be called up, is valid if sanctioned by the Court. *Forestreet Warehouse Co.*, (1888) W.N. 155 = 59 L.T. 214. See, also, *Watson, Walker and Co.*, (1898) W.N. 69. **W-1**

- (b) *Quere.*—Whether a return of capital subject to re-call would be valid without the sanction of the Court though the articles contain an express provision sanctioning such a scheme. See *Buckley*, 9th Ed., p. 137. **X**

(9) Reduction by a defunct Company.

Where a Company has ceased to carry on business and has become defunct, the Court may refuse to sanction any scheme for reduction, the only object of which is to divide the assets among the share-holders in proportion to the amounts paid-up on their shares. *Wallasey Brick Co.*, (1894) W.N. 20; 63 L.J. (Ch.) 415; 70 L.T. 870. **Y**

(10) Surrender of assets to a stranger—Not a reduction.

A Company does not reduce its capital by surrendering part of its assets to a person who is not a member of the Company. *Thompson v. Trustees Corporation* (1895) 2 Ch. 454. **Z**

(11) Reduction, when completed.

A reduction takes effect only on the registration of the order of the Court confirming reduction, and the minute. See S. 18, *infra*. **A**

(12) Liability of members after reduction.

After reduction, the liability of a member in respect of a reduced share shall not exceed the difference, if any, between the amount paid on such share and the amount of the share as fixed by the minute. See S. 19, *infra*. **B**

(13) Reduction by a Company in voluntary liquidation.

A Company in voluntary liquidation can reduce its capital. See *Cooper, Cooper & Johnson*, (1902), W.N. 199; 51 W.R. 314; *Plamer*, 9th Ed., 1104. **C**

(14) Reduction without Court's sanction.

- (a) There are certain transactions which amount to a reduction of capital but which may be affected without the sanction of the Court, such as forfeiture and surrender of shares, and cancellation of unissued shares. **D**

Miscellaneous—(Concluded).

- (b) A forfeiture of shares is a reduction of capital that may be effected without the sanction of Court. The Act recognizes it, and the Regulations usually contain provisions in certain cases. See S. 48 (f) and Sch. A, Table A, Arts. 17 to 22, *infra*. E
- (c) Similarly, "every surrender of shares, whether fully paid or not, involves a reduction of capital". *Per Cozens-Hardy, L.J. in Bellerby v. Rowland, (1902) 2 Ch. 14 (32).* F
- (d) The power of forfeiture must be exercised in strict accordance with the Regulations, and any slight irregularity or deviation from the rules will render the exercise of the power bad. See *Clarke v. Hart, (1858) 6 H.L.C. 688*. See, also, 3 B.H.C.R. (O.C.) 1. G
- (e) Moreover, the power must be exercised *bona fide*, in the interests of the Company, and not merely to enable a share-holder to escape liability. *Richmond's case, Painter's case, 4 K. & J. 305, 325; Spackman v. Evans, (1868) 3 H.L. 171.* H
- (f) A surrender of shares may be accepted only under circumstances which would justify a forfeiture. A surrender under such circumstances is merely equivalent to a forfeiture. *Bellerby v. Rowland, (1902) 2 Ch. 14.* I
- (g) A surrender which would amount to a purchase by the Company of its own shares is invalid. (*Ibid.*) J
- (h) Again, a Company may without the sanction of the Court, reduce its capital by cancelling unissued shares. See S. 23, *infra*. K
- (i) There is another mode of reduction, which may, under the English law, be effected without the sanction of the Court, *viz.*, where a Company has accumulated profits which may be distributed among the share-holders in the form of a dividend or *bonus*, the same or any part of it may be returned to the share-holders, in reduction of paid-up capital, the unpaid capital being thereby increased by a similar amount. S. 40 of the Companies Consolidation Act (1908). L

N.B.—There is no provision corresponding to this in the Indian Act.

14. The Company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words "and reduced," as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the Company.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 48, cl. 1, English Companies (Consolidation) Act, 1908. L1

15. A Company which has passed a special resolution for reducing its capital may apply to the Court by petition for an order confirming the reduction, and, on the hearing of the petition, the Court, if satisfied that, with respect to every creditor of the Company who, under the provisions of this Act, is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided, may make an order confirming the reduction on such terms and subject to such conditions as it deems fit.¹

When the reduction does not involve either the diminution of any liability in respect of unpaid capital or the payment to any share-holder of any paid-up capital, the creditors of the Company shall not, unless the Court otherwise directs, be entitled to object, or required to consent, to the reduction; and it shall not be necessary, before the presentation of any petition under this section, to add, and the Court may, if it thinks fit so to do, dispense with the addition of, the words "and reduced,"² as mentioned in section 14.

In any case that the Court thinks fit so to do, it may require the Company to publish, in such manner as the Court thinks fit, the reasons for the reduction or such other information regarding the same as the Court may think expedient with a view to give proper information to the public in relation to such reduction, and, if the Court thinks fit, the cause which led thereto.

(Notes).

General.

Corresponding English Law.

The first para of this section corresponds to Ss. 47 and 50 of the English Companies (Consolidation) Act, 1908. L2

The second para corresponds to the proviso of S. 48 of the English Act, 1908. L3

The third para corresponds to S. 55 of the English Act, 1908. L4

1.—"The Court, if satisfied....deems fit."

(1) "Court," meaning of.

As to the meaning of the word "Court." See S. 3, *supra*. M

(2) Jurisdiction of Court, discretionary.

(a) The jurisdiction of the Court to make an order confirming reduction is discretionary and when it makes an order it may impose such conditions as it thinks fit. *Direct Spanish Telegraph Co.*, 34 Ch. D. 307; *Barrow Steel Co.*, 89 Ch. D. 582; *Barrow Steel Co.*, (1900) 2 Ch. 846; (1901) 2 Ch. 746; *Pinkney Steamship Co.*, (1892) 3 Ch. 125; *Continental Gas Co.*, Times L.R. 476. N

1.—“*The Court, if satisfied....deems fit*”—(Concluded).

(b) Thus, the Court may impose a condition that the articles shall be altered so as to reduce the voting power of the shares reduced. *Pinkney Steamship Co.*, (1892) 3 Ch. 125. See, also, *Continental Gas Co.*, 7 Times. L.R. 476. O

(c) Though the Court may not impose conditions which would amount to an alteration of the scheme, yet, if such alteration appears necessary, it may refuse its sanction, leaving the Company to bring in another scheme in the altered form, if it thinks fit. *Direct Spanish Telegraph Co.*, 34 Ch.D. 307. See, also, *Barrow Steel Co.*, 39 Ch. D. 588; *Barrow Steel Co.*, (1900) 2 Ch. 846 (1901); 2 Ch. 746. P

N.B.—As to how the discretion of the Court is to be exercised. See notes under S. 13, *supra*.

2.—“*It shall not be necessary....‘and reduced’.*”

Petition for reduction to contain the words “and reduced.”

The expression “before the presentation of any petition under the section”, shows that in cases where the reduction does not involve the diminution of any liability or payment of any paid-up capital, the petition for reduction should contain the words “and reduced” after the name of the Company. If it is intended that the petition should not contain those words, an application should be made before the presentation of the petition and the Court may make an order dispensing with the addition of those words. See *Langdale Chemical Manure Co.*, 22 W. R. 436. Q

16. Where a Company proposes to reduce its capital, every

Creditors may object to reduction and list of objecting creditors to be settled by Court.

creditor of the Company who, at the date fixed by the Court, is entitled to any debt or claim which, if that date were the commencement of the winding-up of the Company, would be admissible in proof against the Company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object.

The Court shall settle a list of such creditors¹, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the Company who are not entered on the list are to claim to be so entered, or to be excluded from the right of objecting to the proposed reduction:

Provided that, when the reduction does not involve either the diminution of any liability in respect of unpaid capital or the payment to any share-holder of any paid-up capital, the creditors of the Company shall not, unless the Court otherwise directs, be entitled to object, or required to consent, to the reduction².

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 49, cls. 1 and 2 of the English Companies (Consolidation) Act, 1908. Q1

1. —“The Court shall settle a list of such creditors.”**(1) Settling list of creditors—Obligatory.**

The language of para 2 is imperative, and the Court is required to settle the list of creditors and cannot dispense with the proceedings here required even though there is evidence that the Company has no debts unsatisfied. *Lawson Stove Co.*, (1895) 2 Ch. 726. R

(2) Debenture holders—Right of.

Debenture holders are also creditors, and if they are not entered in the list they are required within the period fixed by the notice to claim to be entered in the list; otherwise they would be excluded from the right of objecting to the reduction. *In re Credit Foncier of England*, 11 Eq. 356. S

2.—“Provided...to the reduction.”**Discretionary power of Court to permit creditors to object.**

(a) Where the reduction does not involve diminution of any liability in respect of unpaid capital or payment to any share-holder of any paid-up capital, the creditors are not entitled as of right to object to the reduction. But the Court may, if it sees any possibility of injury to them, permit them to object. T

(b) A reduction effected by applying a portion of accumulated profits to redeem a particular class of shares may injure the creditors by reducing the debit to share-holders in the balance sheet, and setting free the like amount of capital assets which the Company will be required, otherwise, to retain. In such a case, the Court may permit creditors to object. See *Buckley*, 9th Ed., p. 144; also *Decido's case*, (1891) 2 Ch. 354. U

(c) Similarly, a reduction by writing off lost capital may injure creditors in cases where the loss, but for the reduction, will have to be made good out of subsequent profits. See *Buckley*, 9th Ed., p. 144. Y

(d) But, if the Company is authorized to pay dividends without making good the loss of capital, the reduction would not affect creditors, and the Court need not permit them to object. See *Buckley*, 9th Ed., p. 144, foot-note (d); *C.F. Lee v. Neuchatel Co.*, 41 Ch. Div. 1; *Verner v. General and Commercial Trust*, (1894) 2 Ch. 239. W

N.B.—In such cases, there need not be any reduction, as nothing would be gained thereby. See *Barrow Steel Co.*, (1900) 2 Ch. 846, 855, 856; *on appeal*, (1901) 2 Ch. 746. W-1

17. When a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged

Court may dispense with consent of creditor on security being given for his debt.

or determined, does not consent ¹ to the proposed reduction, the Court may (if it thinks fit) dispense with such consent on the Company securing the payment of the debt or claim of such creditor by setting apart and appropriating, in such manner as the Court may

direct, a sum of such amount as is hereinafter mentioned (that is to say) :—

- (a) If the full amount of the debt or claim of the creditor is admitted by the Company, or, though not admitted, is such as the Company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated ;
- (b) If the full amount of the debt or claim of the creditor is not admitted by the Company, and is not such as the Company are willing to set apart and appropriate, or if the amount is contingent or not ascertained, then the Court may, if it thinks fit, inquire into and adjudicate upon the validity of such debt or claim, and the amount for which the Company may be liable in respect thereof, in the same manner as if the Company were being wound up by the Court ; and the amount fixed by the Court on such enquiry and adjudication shall be set apart and appropriated.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 49, Cl. 3 of the English Companies (Consolidation) Act, 1908.

W2

I.—“ Where a creditor....does not consent.”

Creditors not consenting to reduction.

- (a) Creditors who do not actively consent will be taken to object. *Patent Ventilating Granery Co.*, (1879), 12 Ch. D. 254. **X**
- (b) Thus, a creditor who having the opportunity to object to the reduction remains passive shall be deemed to be a creditor who does not consent. See Buckley 9th Ed., p. 145. **Y**
- (c) But creditors whose names are entered on the list who neither assent to nor dissent from the proposed reduction and whose debts are secured, must be deemed to have assented and are not creditors ‘ who have not consented’ to the reduction. *In re Credit Foncier of England*, 11 Eq. 356. But See *in re Telegraph Construction Co.*, 10 Eq. 384 (contra). **Z**

18. The Registrar of Joint-Stock Companies, upon the production to him of an order of the Court confirming the reduction of the capital of a Company, and the delivery to him of a copy of the order and of

Order and minute to be registered.

a minute (approved by the Court), showing, with respect to the capital of the Company, as altered by the order, the amount of such

capital, the number of shares in which it is to be divided, and the amount of each share, and the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share ¹, shall register the order and minute; and, on the registration, the special resolution confirmed by the order so registered shall take effect.

Notice of such registration shall be published in such manner as the Court may direct.

The Registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Act, with respect to the reduction of capital, have been complied with, and that the capital of the Company is such as is stated in the minute ².

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 51 of the English Companies (Consolidation) Act, 1908. Z1

1.—“ A minute.... on each share.”

(1) Minute to contain amount of original capital and numbers of shares.

(a) The minute must contain not only the amount of reduced capital, but also the amount from which the capital has been reduced. *Barrow Steel Co.*, 39 Ch. D. 582, 603; *West Cumberland Steel Co.*, (1888) W.N. 54; *Britannia Mills*, (1888) W.N. 103. A

N.B.—But this is not always necessary. See *Solway Steamship Co.*, 61 L.T. 659.

(b) The minute should also contain the serial numbers of the partly paid shares. *Solway Steamship Co.*, 61 L.T. 659. B

(2) Advertisement of petition.

The Court will not dispense with the advertisement of the petition in the absence of special circumstances. *Cons. Telephone Co.*, (1885) W. N. 42; 33 W.R. 438. C

2.—“ His certificate.... minute.”

Conclusive effect of the certificate.

(a) As the certificate is conclusive evidence that the requisitions of the Act as to the reduction have been complied with, a reduction cannot, after the granting of the certificate, be impeached on the ground that there was a not sufficient interval between the passing and the confirmation of the special resolution. *Ladies' Dress Assoc. v. Pulbrook*, (1900) 2 Q. B. 376. D

(b) Nor can it be alleged that the articles did not authorize the Company to reduce its capital. *Walker and Smith, Lim.* (1903), W.N. 82. E

19. The minute, when registered, shall be deemed to be substituted for the corresponding part of the memorandum of association of the Company, and shall be of the same validity, and subject to the same alterations, as if it had been originally contained in the memorandum of association; and subject as in this Act mentioned, no member of the Company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute.

Minute to form
part of memoran-
dum of association.

(Notes).

General.

Corresponding English Law.

The first part of this section corresponds to S. 52, cl. 1 of the English Companies (Consolidation) Act, 1908. E1

The second part corresponds to S. 53, cl. 1 of the English Companies (Consolidation) Act, 1908. E2

20. If any creditor who is entitled in respect of any debt or claim to object to the reduction of the capital of a Company under this Act is, in consequence of his ignorance of the proceedings taken with a view to such reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after such reduction the Company is unable, within the meaning of this Act, to pay to the creditor the amount of such debt or claim, every person who was a member of the Company at the date of the registration of the order and minute relating to the reduction of its capital shall be liable to contribute for the payment of such debt or claim an amount not exceeding the amount which he would have been liable to contribute if the Company had commenced to be wound up on the day prior to such registration; and, on the Company being wound up, the Court, on the application of such creditor, and on proof that he was ignorant of the proceedings taken with a view to the reduction, or of their nature and effect with respect to his claim, may, if it thinks fit, settle a list of such contributories accordingly, and make and enforce calls and orders on the contributories settled on such list in the same manner in all respects as if they were ordinary contributories in a winding-up.

Saving of rights of
creditors who are
ignorant of proceed-
ings.

Nothing in this section shall affect the rights of the contributories of the Company among themselves.

(Notes).
General.

Corresponding English Law.

This section corresponds to the proviso and cl. 3 of S. 53 of the English Companies (Consolidation) Act, 1908. E3

21. A minute, when registered, shall be embodied in every copy of the memorandum of association issued after its registration; and if any Company makes default in complying with the provisions of this section, it shall incur a penalty not exceeding ten rupees for each copy in respect of which such default is made; and every director and manager of the Company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

Registered minute to be embodied in memorandum of association.

(Notes).
General.

Corresponding English Law.

This section corresponds to (the second part of cl. 1 and cl. 2 of S. 52 of the English Companies (Consolidation) Act, 1908. The words 'Ten rupees' are found in the Indian Act instead of the words 'one pound' which occur in the English Act. E4

22. If any director, manager or officer of the Company wilfully conceals the name of any creditor of the Company who is entitled to object to the proposed reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor of the Company, or if any director or manager of the Company abets, within the meaning of the Indian Penal Code, any such concealment or misrepresentation as aforesaid, every such director, manager or officer shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Penalty on concealment of name of creditor.

English Law.

Corresponding English Law.

This section corresponds to S. 54 of the English Companies (Consolidation) Act of 1908. E5

23. Any Company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations, as originally framed or as altered by special resolution as to reduce its capital by cancelling any shares which, at the date of passing such resolution, have not been taken or agreed to be taken by any persons; and the provisions as to reduction of capital contained in the other sections of this Act shall not apply to any reduction made in pursuance of this section¹.

Power to reduce capital by cancellation of unissued shares.

(Notes).

General.

Corresponding English Law.

This section corresponds S. 41, cls. (1) (e) and (4) of the English Companies (Consolidation) Act, 1908. E6

I.—“The provisions....section.”

Reduction under the section need not be sanctioned by Court.

A reduction capital by the cancellation of unissued shares does not require the sanction of the Court. F

Sub-division of Shares.

24. Any Company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorised so to do by its regulations as originally framed or as altered by special resolution, as, by sub-division of its existing shares or any of them, to divide its capital, or any part thereof, into shares of smaller amount than is fixed by its memorandum of association :

Shares may be divided into shares of smaller amount.

Provided that, in the sub-division of the existing shares, the proportion between the amount which is paid and the amount (if any) which is unpaid on each share of reduced amount shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 41, cl. (d) of the English Companies (Consolidation) Act of 1908. F-1

Alteration of capital—Special resolution when necessary.

A sub-division of capital under this section or a reduction under S. 18, *supra*, can be effected only by a special resolution. But no special resolution unless the regulations provide otherwise, is necessary for an increase, consolidation or conversion of capital under S. 12, *supra*, or for a reduction of capital under S. 23, *supra*. G

25. The statement of the number and amount of the shares into which the capital of the Company is divided, contained in every copy of the memorandum of association issued after the passing of any such special resolution, shall be in accordance with such resolution; and any Company which makes default in complying with the provisions of this section shall incur a penalty not

Special resolution to be embodied in memorandum of association.

exceeding twenty rupees for each copy in respect of which such default is made; and every director and manager of the Company who knowingly or wilfully authorises or permits such default shall incur the like penalty.

(Notes).

General.

Alteration of memorandum to accord with alteration of capital—Difference between English and Indian Law.

The requirement that copies of memorandum issued after an alteration of capital under S. 24, should be in accordance with the alteration extends under the English law also to cases of alteration by the increase of share capital, by consolidation, by division of share capital, conversion of share capital, and by cancellation of shares. See Companies (Consolidation) Act, (1908), Ss. 41 and 52. H

The Indian law follows the old English Law.

Associations not for Profit.

26. Where any association which might be formed under this Act as a limited Company proves to the Local Government that it is formed for the purpose of promoting commerce, art, science, charity or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may, by license under the hand of one of its Secretaries, direct such association to be registered with limited liability, without the addition of the word "limited" to its name¹; and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to the obligations by this Act imposed on limited Companies²; with the exceptions that none of the provisions of this Act that require a limited Company to use the word "limited" as any part of its name, or to publish its name, or to send a list of its members, directors or managers to the Registrar, shall apply to an association so registered.

The license by the Local Government may be granted upon such conditions and subject to such regulations as the Local Government thinks fit to impose; and such conditions and regulations shall be binding on the association, and may at the option of the Local Government be inserted in the memorandum and articles of association, or in both or one of such documents.

Special provisions
as to associations
formed for purposes
not of gain.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 20, cls. 1, 2 and 3 of the English Companies (Consolidation) Act of 1908. H1

Section, whether applies to associations not exclusively charitable.

- (a) *Quere.*—Whether the section does not apply to a Company formed for promoting commerce, &c., not exclusively, but as its main and chief object. *Cf. Inst. of Civil Engineers*, 20 Q.B.D. 621; 15 A.C. 334. I
- (b) An association whose substantial object is not carrying on business for gain, need not be registered under the Act, though gain may arise incidentally. 17 C 736. J

1.—“The Local Government may....to its name.”

(1) Local Government, meaning of.

“Local Government” shall mean the person authorised by law to administer executive Government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner. General Clauses Act (X of 1897), S. 3 (29). K

(2) Alteration of memorandum of a Company under the section—Need for Local Government's sanction.

If a Company to which a license has been granted, wants to alter its memorandum with a view to extend its objects, it should obtain the sanction of the Local Government, before applying to the Court for sanction. See *St. Hilda's College*, (1901), 1 Ch. 556. L

(3) License under the section—Revocability of—Difference between English and Indian Law.

- (a) Under the corresponding section of the English Act (S. 20) the license is to be given by the Board of trade. But the license granted under that section is revocable and upon its revocation the Registrar shall enter the word “Limited” at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by that section. M
- (b) This provision as to the revocability of license was first introduced by S. 42 of the Companies Act of 1907, reproduced by S. 20 of the Consolidation Act 1908. Before that the license was irrevocable. The Indian Act follows the English Act as it stood before (1907), and a license granted by the Local Government would, it seems, be irrevocable. N

2.—“Upon registration....on limited Companies.”

Charitable associations' power to hold lands—Difference between English and Indian Law.

S. 19 of the English Companies (Consolidation) Act (1908) imposes a restriction on charitable and other associations not for profit, *viz.*, that they shall not hold more than two acres of land without the license of the Board of Trade. No such restriction exists under the Indian Act. O

Calls upon Shares.

27. Nothing herein contained shall be deemed to prevent any Company under this Act, if authorised by its regulations as originally framed or as altered by special resolution, from doing any one or more of the following things, namely :—

Company may
have some shares
fully paid, and others
not.

- (a) making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid and in the time of payment of such calls ¹ ;
- (b) accepting from any member of the Company who assents thereto the whole or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him or without any call having been made ² ;
- (c) paying dividend in proportion to the amount paid up on each share in cases where a larger amount is paid up on some shares than on others ³.

(Notes).**General.****Corresponding English Law.**

This section corresponds to S. 39 of the English Companies' (Consolidation) Act, 1908.

O-1

1.—“ Making arrangement....such calls.”**(1) Propriety and necessity for calls—By whom determined.**

Questions as to the propriety or necessity of a call relate to the internal management of the Company, and are left to the discretion of the directors, and the Court will not generally interfere with their discretion and investigate such questions. *Bailey v. Birkenhead Railway Co.*, 12 Beav. 448.

P

(2) Calls by whom to be made.

- (a) The Act contains no provision as to the authority by which calls are to be made in a going Company, but leaves it to be determined by the regulations. See Buckley, p. 568. Q
- (b) The regulation may give the power of making calls to the Company. But generally such power is conferred on the directors. (See Table A. Art. 4, *infra*). R

(3) Calls made by Directors.

- (a) The directors stand in a fiduciary relation to the general body of shareholders and should not exercise the power of making calls for their own benefit in disregard of the interest of the shareholders. *Gilbert's case*, 5 Ch. 559. S

1.—“*Making arrangement...such calls*”—(Continued).

(b) “Directors are fiduciary donees, of their powers, and are bound to exercise them so as not to give themselves an advantage over other shareholders.” *Per Rigby, L.J. (Ibid.)* **T**

(c) They should not, therefore, without making a proper disclosure of facts, make any arrangement by which calls are made on other shareholders while they themselves are not made liable. *Alexander v. Automatic Telephone Co., (1900), 2 Ch. 56.* **U**

(d) In the absence of any arrangement under the regulations in accordance with cl. (a) of the section, the directors cannot make calls on some of the shareholders to the exclusion of others. See *Preston v. Grand Collier Dock Co., (1840), 11 Sim. 327.* **Y**

N.B.—A director, however, is not a trustee in the strict sense of the term. He is only in a qualified sense, a trustee for the general body of creditors. See *Forest of Dean Coal Co., 10 Ch. D. 450.* **W**

(4) **Calls to be in accordance with regulations.**

Since the regulations of the Company constitute the terms of the contract whereby a shareholder has agreed to take his shares, all the requirements of the regulations must be strictly observed in making a call; otherwise the call may be invalid. *Evans and Cooper, p. 8.* **W-1**

(5) **Resolution for call to fix the amount and time for payment.**

A call cannot be enforced unless the resolution for it fixes the amount and the time for payment. *Cawley & Co., 42 Ch. D. 209.* **X**

(6) **Payment on allotment—Not a call.**

The payment required to be made on an allotment of shares is not a call. *Croskey v. Bank of Wales, 4 Giff. 314; 9 Jur. (N.S.) 595.* **Y**

(7) **Allotment of shares—Meaning of.**

“What is termed ‘allotment’ is generally neither more nor less than the acceptance by the Company of the offer to take shares.” *Per Chitty, J., in Nicol’s Case (1885), 29 C.D. at p. 426.* **Z**

(8) **Call when due.**

A call is owing from the day on which it is made although it is payable on a subsequent day. *Re China Steamship Co., Dave’s case, 38 L.J. (Ch.) 512.* **A**

(9) **Date of call how determined.**

(a) In order to ascertain the date when a call shall be deemed to have been made, the practice of the Company, shall, in the absence of a definite provision as to the date, be looked to. *Addams v. Ferrick, 26 Beav. 384, 394.* **B**

(b) A call shall be deemed to have been made when the resolution authorising the call is passed, not when notice of the call is given to the shareholder. *Reg v. Londonderry Rly. Co., (1849) 13 Q.B. 998.* See, also, Table A. Art. 5. **C**

(10) **Suit for calls—Limitation.**

(a) A suit for a call by a Company registered under this Act is governed by Art. 112 of the Limitation Act (IX of 1908), and must be brought within three years from the date on which the call is payable, but suits by the liquidator after winding up, are governed by Art. 120. 160 P.L.R. (1903); 10 B. 483 (487). **D**

1.—“*Making arrangement...such calls*”—(Continued).

- (b) A suit to enforce the liability of a share-holder in respect of his shares, is not barred, if brought within three years from the date that his name is entered in the register as the holder of such shares. 17 B. 472. **E**

(11) **Due notice of calls.**

- (a) A share-holder who has had notice of a call cannot in an action for enforcing the payment of it set up the defence that other share-holders have not received notice. *Newry and Enniskillen Railway Co. v. Edmunds*, 2 Ex. 118. **F**
- (b) Nor can he allege that the form of notice was such that it would not be a valid notice as to some of the share-holders. *Shackelford, Ford & Co. v. Dangerfield*, L.R. 3 C.P. 407. **G**
- (c) If a Company that is about to change its name makes a call in the old name, and before the change of name is completed, notice of the call is given in the new name, and afterwards an action to enforce payment of call is brought in the old name of the Company against a share-holder who knew of the change, there is sufficient notice of the call, and the defendant cannot set up a defence of want of notice. *Shackelford, Ford & Co. v. Dangerfield*, L.R. 3 C.P. 407.

N.B.—But the notice must clearly show that the share-holder is required to pay the amount specified in the notice. A mere notice that the Company would incur liabilities and would then stand in need of money is not a sufficient notice. *Chubuwa Tea Co. v. Barry*, 15 L. T. 449. **H & I**

(12) **Irregularities in calls.**

- (a) A call made by directors not properly appointed is invalid unless the regulations contain a provision similar to Art. 71, Sch. A, *infra*. *Garden Gully Co. v. McLister*, 1 A.C. 59. **J**
- (b) Likewise, calls made by a smaller number of directors than the minimum fixed by the regulations are invalid unless the regulations give power to act notwithstanding vacancies. *Alma Spinning Co., Bottomley's case*, 16 Ch. D. 681.

N.B.—But a call made at a meeting at which the necessary *quorum* of directors is not present may be good, if confirmed at a meeting when the *quorum* is present. *Phosphate of Lime Co., Austin's Case* (1871), 24 L.T. 932. **K & L**

(13) **Calls not affected by slight irregularities.**

A call otherwise valid would not be vitiated by a slight irregularity. *Phosphate of Lime Co., Austin's Case*, 24 L.T. 932; *British Sugar Refining Co.*, 2 K. & J. 408; *Sheffield Railway Co. v. Woodcock*, 7 M. & W. 574; *Miles v. Bough*, 3 Q.B. 845; *Southampton Dock Co., v. Richards*, 2 Railway Cas. 215; 1 M. & Gr. 448; *Shackelford, Ford & Co. v. Dangerfield*, L.R. 3 C.P. 407. **M**

N.B.—But, if a call is illegal as where it is made for an object not within the powers of the Company, the Court will interfere on the application of a minority of share-holders or even of a single share-holder where the majority are in favour of the call. See Buckley, p. 570, also *Natusch v. Irving*, 2 Coop. C.C. 358. **N**

(14) **Call by prospective resolution—Validity of.**

A call made by a prospective resolution is not on that account void. *Sheffield Railway Co. v. Woodcock*, 7 M. & W. 574. **O**

I.—“*Making arrangement...such calls*”—(Continued).

(15) Example of a prospective call.

If a resolution is passed on the 1st of August, that a call be made on the 15th of August, payable on the 1st of September, the call is by a prospective resolution. (*Ibid.*)

Quere.—Whether the resolution should be treated as a resolution of the 15th August. P

(16) Agreement for payment of calls otherwise than in cash—Validity of.

(a) *Quere.*—Whether an agreement that calls shall not be paid in cash but shall be set off against goods to be supplied by the share-holder is valid. See *Pellat's Case*, 2 Ch. 527; *E.P. Clark*, 7 Eq. 550.

N.B.—Such an agreement would not relieve a share-holder from his obligation to pay a call made in winding-up. See *Buckley*, p. 572. Q & R

(b) Payment of a call by a debenture of the Company not yet payable, but which the directors have redeemed at a discount is not a valid payment. *Habershon's case*, 5 Eq. 286. S

(17) Agreement for non-payment of calls—Validity of.

An agreement that a person shall be a share-holder only for participating in the profits, but not for paying calls is *ultra vires* and void. *Bunn's case*, 2 D.F. & J. 225, 295, 299. See, also, *E.P. Clark*, 7 Eq. 550. T

(18) Prospectus—Statement of intention not to make calls beyond a certain sum—Effect of.

A statement in the prospectus of an intention not to make calls beyond a certain amount, would not prevent the Company from making calls beyond that amount or relieve the share-holder of his obligation to pay the same. *Accidental Insurance Co. v. Davies*, 15 L.T. 182. U

(19) Call before capital has been fully subscribed—Validity of—Difference between English and Indian Law.

(a) A person cannot refuse to pay calls on the ground that only a small or even an insignificant portion of the total amount of shares offered for subscription has been taken up. *Cf. Ornamental Pyrographic Co. v. Brown*, 2 H.C. 63; 32 L.J. (Ex.) 190. Y

(b) There is no provision in the Act to the effect that a Company shall not commence business or make any calls until the whole amount or a prescribed portion of the share capital offered for subscription has been taken up. W

(c) This was also the law in England till the Companies Act of 1900 came into force when by S. 4 of the Act (= S. 85 of the Consolidation Act of 1908) it was provided that no allotment of any share capital shall be made unless the amount (if any) fixed by the memorandum or articles and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment, or if no amount has been thus fixed, then, the whole amount of the share capital offered for subscription, has been subscribed; and by S. 6, (= S. 87 of the Consolidation Act, it was provided that a Company shall not commence any business or exercise any borrowing powers until the shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less on the whole than the minimum subscription. X

1.—“*Making arrangement....such calls*”—(Concluded).

- (d) The result of this enactment would be that under the English Law a Company cannot make any allotment or make any calls until the minimum amount of shares fixed by the memorandum or articles or if none have been thus fixed, then the whole amount of capital offered for subscription has been taken up.

N.B.—But, even under the Indian Act, as under the English Law before 1900, if the articles contain a provision that business shall not be commenced until the capital or a fixed portion of it has been subscribed, effect will be given to such provision, and a call made before the allotment of all the shares thus fixed, could not be recovered. See *North Stafford Steel Co. v. Ward L.R.*, 3 Ex. 372; *Pierce v. Jersey Water works Co.*, L.R. 5 Ex. 209. **Y & Z**

(20) **Effect of transfer after call, on liability to pay.**

- (a) “If a transfer of shares has been made and registered after a call has been made, but before it has become payable, it is conceived, although it is by no means clear, that the transferor and not the transferee is the person liable in an action for the call.” Buckley, p. 574, **A**

- (b) Where the regulations of a Company prohibited transfers of shares while arrears of calls remained unpaid, a person to whom a transfer was made and who was accepted as a transferee by the Company was held not liable to pay a call which was in arrears when the transfer was made. *Watson v. Eales*, 23 Beav. 294. **B**

(21) **Interest on over-due calls.**

A share-holder who is in arrear in respect of calls will be liable to pay interest if the regulations so provide. (See Table A, Art. 6, *infra*.) **C**

(22) **Forfeiture for non-payment of calls.**

The Regulations may likewise authorize forfeiture of shares for non-payment of calls. (See Table A, Art. 17 to 19). **D**

(23) **Forfeiture for non-payment of call—Fresh call for the same sum, on re-issue.**

If a share is forfeited for non-payment of a call and is re-issued, a fresh call may be made on the purchaser of that share for the amount due by the former holder on the call for the non-payment of which the share was forfeited. *New Balkis v. Randt Gold*, 1903, 1 K.B. 461; (1904) A.C. 165, *re Randt Gold Mining Co.*, (1904), 2 Ch. 468. **E**

(24) **Enforcement in winding-up of a call previously made.**

A liquidator may enforce the payment of a call made by the directors previous to the winding-up. *Stone v. City and County Bank*, 3 C.P. Div. 282, 299, 309. **F**

(25) **Agreement to pay for shares in instalments—Not binding on liquidator.**

An agreement between a Company and its members for payment of shares by instalments is determined when the Company is wound up, and the liquidator can make an immediate call for the whole amount remaining unpaid. *Cordova Union Gold Co.*, 1891, 2 Ch. 580; *London Provident Society v. Morgan*, 1893, 2 Q.B. 266, 272.

N.B.—As to the liability of share-holders to contribute, in a winding up, see notes to S, 61, *infra*, **G & H**

2.—“Accepting....been made.”

General.

This clause is an exact reproduction of sub-s. 2 of S. 24 of the English Companies Act of 1867. The corresponding section 39 (2) of the Companies Consolidation Act of 1908, does not contain the words “in discharge.....in respect of any other share or shares held by him.” These words have been omitted because the power conferred by them were found to be of no practical advantage, and they were, moreover, found to be unintelligible. See *Evans & Cooper*, p. 46. I

Interest on payments in advance of calls.

- (a) In the case of Companies which adopt the provisions of table A, cl. 7, *infra*, the directors may accept from any member all or any of the moneys due upon the shares held by him beyond the sums actually called for and pay interest on the same at such rate as may be agreed upon. See *Lock v. Queensland Mortgage Co.*, (1896), A.C. 461. J
- (b) In the event of liquidation, arrears of such interest rank after outside debts and the costs of winding-up, but have priority over money paid on a call. *Re Wakefield Rolling Stock Co.*, (1892), 3 Ch. 165. K
- (c) The word “interest” in that clause does not mean dividend, and a clause in the regulations for paying such interest out of the capital is not *ultra vires*, and a payment in pursuance of such provision is valid. *Lock v. Queensland Mortgage Co.*, (1896), A.C. 461. L

3.—“Paying dividend....others.”

(1) Dividend—Meaning of.

- (a) Etymologically a dividend is the “*dividendum*,” the total divisible sum. But ordinarily it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. *Lamp-lough v. Kent Water-works*, (1903) 1 Ch. 575, 588; (1904), A.C. 27. M
- (b) “The payment of a dividend is a distribution, intended to be made periodically by a Company among its share-holders, of its revenue or profits.” *Evans & Cooper*, p. 47. N

(2) Authority to declare dividends.

The articles generally give the power of declaring dividends to the share-holders either with or without the sanction of a general meeting or to the share-holders in general meeting. *Evans & Cooper*, p. 47. O

(3) Discretionary power of directors, to declare dividends.

If the articles empower the directors to deal with the profits either by declaring a dividend or appropriating it to the reserve fund, the directors can add to the existing reserve fund a portion of the profits, though it may have the effect of diminishing the amount of dividend which they could otherwise declare. The share-holders have no right to withdraw from the reserve a sum sufficient to enable the directors to declare a suitable dividend, and cannot direct the directors to declare a dividend greater or less than recommended by them. 10 B. 415.

N.B.—The only remedy of the share-holders if they are dissatisfied with the directors, is to remove them from office, or to alter the articles of association. 10 B. 415. P & Q

3.—“*Paying dividend....others*”—(Continued).

(4) Dividends on paid-up capital, when payable.

(a) Unless the regulations provide for payment of dividend in proportion to the paid-up capital, dividends will be paid only in proportion to the nominal value of share capital held by each share-holder, irrespective of the amount paid up. *Oakbank Oil Co. v. Crum* (1883), 8 A.C. 65; *re Bridgewater Navigation Co.*, (1889), 14 A.C. 525. R

(b) Where the regulations, as in the case of companies adopting table A, provide for the payment of dividends to members “in proportion to their shares,” the dividends should be in proportion to the nominal value of the shares and not in proportion to the amount paid up. Thus, if A has 10—Re. 1—shares with four annas paid-up on each, and B has 10—Re. 1—shares with 8 annas paid-up on each, and a dividend of 10 per cent. is declared, each will get Re. 1, though A has paid Rs. 2½ and B Rs. 5. (*Ibid.*) S

(5) Dividends to be paid in cash.

Dividends should be paid in cash unless the regulations expressly provide for some other form of payment. *Wood v. Odessa water works Co.*, 42 Ch. D. 636. T

(6) Dividends on different classes of shares—how paid.

When there are different classes of shares, *e.g.*, preference and ordinary shares, dividends should be paid according to the rights of the share-holders as fixed by the memorandum or the articles. *Evans & Copper*, p. 48. U

(7) Declaration of dividend creates a debt.

A dividend that has been declared is a debt due from the Company to the share-holder payable at the time the dividend is made payable. *Re Severn Railway Co.*, (1896), 1 Ch. 559; *following Smith v. Cork and Bandon Ry.*, L.R., 5 Eq. 65, 75. Y

N.B.—The Regulations of the Company usually fix the time within which dividends can be claimed.

(8) Dividends not to be paid out of capital.

(a) Dividends should never be paid out of capital. *Osford Building Society*, (1887), 35 Ch. D. 502; *Flitcroft's Case* (1882), 21 Ch. D. 519; *Masonic Assurance Co. v. Sharpe*, (1892), 1 Ch. 154. W

(b) Such payment cannot be authorized even by the memorandum or the articles, or a general meeting. (*Ibid.*) X

N.B.—Directors who pay dividends out of capital are guilty of breach of trust and are liable to the Company for any amount so paid. (*Ibid.*) Y

(9) Payment of dividends out of moneys which are not net profits.

Though payment of dividends out of capital is prohibited, dividends can be paid out of moneys which are not ‘net profits.’

N.B.—There is a difficulty in drawing the line between capital and net profits chiefly arising from the various methods in which depreciation or loss of assets may be dealt with. *Evans & Cooper*, p. 48, Z

3.—“Paying dividend...others”—(Concluded).

- (10) When can dividends be paid out of revenue without making good depreciation of capital.

The answer to the question whether dividends can be paid out of the revenue, or only out of the net profits after deducting from the revenue a sum that may be necessary to make good the depreciation of capital, depends on the constitution and objects of each Company and varies with the class of business carried on. *Evans & Cooper*, pp. 48, 49. **A & B**

N.B.—The following are some general principles extracted by Messrs Evans & Cooper from the more important cases on the subject.

- (a) “The fixed capital” of a Company need not be maintained out of revenue, but the “circulating capital” must be made good before dividends are paid. **C**
- (b) “If the objects of a Company include the sinking of capital in wasting property, depreciation by waste need not necessarily appear in the revenue account, but may, if the regulations so provide, be dealt with in the capital amount.” *Le. v. Neuchatel Co.*, (1889), 41 Ch. D. 1. **D**
- (c) “If the capital account, is in credit, the credit balance, when realized, may be used for the payment of dividends, if the constitution of the Company allows it, since there is nothing in the Act to prevent it, and there is no obligation to retain appreciation of the capital.” *Lubbock v. British Bank of South Africa*, (1892), 2 Ch. 198. **E**

- (11) “Fixed capital”—Meaning of.

“Fixed capital” means that portion of a Company’s assets which consists of investments of a more or less permanent form, such as land, buildings, plant, or securities purchased for the sake of the income they produce.” *Evans & Cooper*, p. 49. **F**

- (12) Circulating capital—Meaning of.

Circulating capital—consists of that portion of the Company’s assets which is used for ‘turn over’ purposes, though incidentally it may be income-bearing while retained. *Verner v. General and Commercial Trusts*, (1894), 2 Ch. 239. **G**

- (13) Provision for reserve fund.

- (a) The regulations of a Company generally provide for the formation of a reserve fund, by empowering the directors to set aside, before recommending any dividend, a portion of the profits to meet contingencies, or for equalizing dividends or for repairing or maintaining the works connected with the Company’s business. (See Table A : cl. 74, *infra*). **H**
- (b) Even where the regulations do not contain a provision for the formation of a reserve fund, a reserve fund may be formed with the approval of the share-holders, and used in the business of the Company itself, or invested in such securities as the directors may select, subject to the control of a general meeting. *Burland v. Earle*, (1902) A. C. 83. **I**

- (14) Use of reserve fund in the Company’s business.

A Company empowered to use its reserve fund may use it in its business. But the fund cannot, if not thus used, be invested by the Company in its own shares though it may be invested in the shares of other companies. *Evans & Cooper*, p. 50. **J**

28. Every share in any Company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash ¹, unless the same has been otherwise determined by a contract duly made in writing ² and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares ³.

Manner in which shares are to be issued and held.

(Notes).

General.

(1) Difference between English and Indian Law.

This section exactly corresponds to S. 25 of the English Companies Act of 1867. That section was repealed by S. 33 of the Companies Act of 1900.

Under the present English Law, "though it is still necessary to file a contract in writing with the Registrar" in cases where shares are allotted as fully paid up or partly paid up otherwise than in cash, yet, (1) the contract need not be filed at or before the issue of the shares; it may be filed within one month after the allotment; (2) failure to file the contract within one month will not prejudice the allottee or result in the shares being treated as unpaid. It will merely render the officers of the Company liable to penalties." See S. 83 of the Companies (Consolidation) Act (1908); also Buckley 9th Ed. p. 200. **K**

(2) Section applies to subscribers of memorandum as well as to other members.

Subscribers to the memorandum of association are to pay for shares in the same way as other members. *Re Baglan Hall Colliery Co.*, (1870), 5 Ch. 346. **L**

1.—"Every share....cash."

(1) Payment of shares otherwise than in cash when valid.

(a) The section prohibits contracts for payment otherwise than in cash, except by a registered instrument. *British Farmer's*, 7 Ch. D. 533, 535. **M**

(b) The section does not permit payment for shares otherwise than in cash, by any arrangement entered into subsequent to the issue of the shares, or even by any previous arrangement unless registered. *Fothergill's case*, 8 Ch. D. 270, 282; *Ferrao's case*, 9 Ch. 355, 356 (n); *British Farmer's Co.* 7 Ch. D. 533, 535. **N**

(2) Shares not to be issued at a discount.

The Act does not authorize the issue of shares at a discount. See *Ooregam Gold Mining Co. v. Roper*, (1892) App. Ca. 125; See, also, *ex parte Sandys* (1889), 42 Ch. D. 98; *Walton v. Saffery*, (1897) App. Ca. 299; *Weymouth and Channel Islands Steam Packet Co.*, (1891) 1 Ch. 66. **O**

(3) Liability of share-holder who takes shares at a discount.

(a) A share-holder who takes a share as fully paid-up, in consideration of a smaller sum than the nominal amount of the share is in the event of a winding up liable to pay the balance unpaid, notwithstanding any contract made with the Company, and even if such contract is filed with the Registrar. *Ooregam Gold Mining Co. v. Roper*, (1892) App. Ca. 125; see, also, *ex parte Sandys*, (1889) 42 Ch. D. 98. **P**

I.—“Every share....cash”—(Continued).

- (b) Calls on such share in a winding-up should be made for the benefit of contributories as well as creditors. *Welton v. Saffery*, (1897) App. Ca. 299; *Weymouth and Channel Islands Steam Packet Co.*, (1891), 1 Ch. 66. Q

(4) What constitutes payment in cash.

Payment in cash means any transaction between a company and a shareholder, which would in an action to enforce calls support a plea of payment. *Spargo's case*, 8 Ch. 407; see, also, *Larocque v. Beauchemin*, (1897), A.C. 358; *North Sydney Co. v. Higgins* (1899), A.C. 263. R

(5) Payment by set-off.

- (a) “The Act is satisfied if at the time there was money due by the Company to the share-holder which could be satisfied by the calls due on the shares, and if there was an agreement in effect that it should be so satisfied.” See *White's Case*, 12 Ch. D. 517, 519; *per Cotton L.J.* S
- (b) “It is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form of handing the money backwards and forwards.” *Per Mellish, L.J.*, in *Spargo's Case*, (1873), 8 Ch. at p. 414; approved in *Larocque v. Beauchemin*, (1897) A.C. 358; and in *North Sydney Investment Co. v. Higgins*, (1899) A.C. 263. T
- (c) “There must be money due from the one to the other on both sides, and the parties must agree to set one demand of money against the other demand of money.” *Brett, L.J.* in *White's case*, 12 Ch. D. 517; see, also, *Johannesburg Co., E. P. Zoutpansberg Co.*, (1891), 1 Ch. 119. U
- (d) Where a company strikes a balance between the amount payable by it to the promoters for a property purchased, and the amount due from them to the Company on an agreement to take shares to be paid for in cash, and credits the promoters with certain fully paid-up shares in part-performance thereof, there is a payment in cash within the meaning of the sections. *Larocque v. Beauchemin* (1897) A.C. 358; *Spargo's case* (1873), 8 Ch. App. 407; see, also, *Spargo's case*, 8 Ch. 407; *North Sydney Co. v. Higgins*, (1899) A.C. 233. Y
- (e) Similarly, if the Company owes a third person a sum of money payable presently, and the sum is under an arrangement credited to the account of a share-holder in respect of his shares, it is a valid payment. *Ferro's case*, 9 Ch. 355; *Barrow-in-Furness Co.*, 14 Ch. D. 400; *Jones Lloyd & Co.*, 41 Ch. D. 159; *North Sydney Co. v. Higgins*, (1899), A.C. 263. W
- (f) Again, where a sum of money becomes payable to a share-holder under an arrangement *bona fide* entered into with him by the Company, the money may be credited to the share-holder in respect of calls, and this would constitute a good payment in cash although the Company soon after goes into liquidation. *Adamson's case*, 18 Eq. 670; *Bentley's case*, 12 Ch. D. 850.

N.B.—The sum thus credited may be applied even in payment of calls in advance. *Jones, Lloyd and Co.*, 41 Ch.D. 159. X & Y

I.—“Every share....cash”—(Continued).

(6) Set-off must be carried out.

A mere agreement to pay does not amount to payment, and if it is intended to prove payment by set-off, it must be shown that the set-off was actually carried out, e.g., by proper entries in the books. See *Buckley*, p. 202. See, also, *Kent's case*, 37 Ch. D. 503=39 Ch. D. 259. **Z**

N.B.—But though the entries in the books may be important as evidence of set-off, still, if the alleged set-off is otherwise proved, the mere omission of the Company to make the proper entries in their books cannot prejudice the share-holder. (*Ibid.*) See, also, *Jones, Lloyd and Co.*, 41 Ch. D. 159. **A**

(7) Transactions not amounting to payment in cash.

(a) Where the circumstances relied on would, support only a plea of *accord and satisfaction*, there would be no “payment in cash” within the meaning of this section. 16 B. 161. See, also, *Fothergill's case*, 8 Ch. 270, 282; *Spargo's case*, 8 Ch. 407, 411, 414; *White's case*, 12 Ch.D. 511, 517. **B**

(b) A broker employed by a Company under a tacit agreement that he would get the usual broker's commission, was given two paid-up shares for his services at a time when the amount of commission due to him had not been settled, and no demand was made for the payment of any specified sum. *Held*, he was liable for calls on these shares, and the fact that the shares had been given as remuneration for his services could not be pleaded as payment of the calls as no definite sum had been found due to him when the shares were taken by him. (*Ibid.*) **C**

(c) If a subscriber of the memorandum of association sells some property to the Company and agrees to take payment in paid-up shares there is no payment in cash within the meaning of the section, for, the shares cannot be set off against a money demand. *Fothergill's case*, 8 Ch. 270. **D**

N.B.—In order however that such a transaction may amount to a payment in kind, it is necessary that the contract should be registered as required by the section, and it must further appear from the contract itself that the shares to be taken in purchase of the property are identical with the shares subscribed for in the memorandum. The document itself must identify the two sets of shares, and the Court cannot look at the proceedings of the parties, or at any unregistered document for ascertaining the same. *Fothergill's case*, 8 Ch. 270; *Coate's case*, 17 Eq. 169. **E**

N.B.—The difficulty as to identification would disappear if the memorandum of association as well as the contract for sale, should specify the denoting numbers of the shares to be allotted. See *Nicolas and Lawrence*, 3rd Ed., p. 98. **F**

(d) The rendering of some service to the Company to be paid for in paid-up shares, is not a payment in cash. *Pagin and Gill's case*, 6 Ch. D. 681; *Andress' case*, 8 Ch. D. 126; *White's case*, 10 Ch. D. 720. **G**

N.B.—“The principle is, that if the contract is for sale for cash presently payable, no registered contract is necessary, for, by set-off the

1.—“Every share....cash”—(Concluded).

shares are paid in cash; but that on the other hand, if the contract is for sale for paid-up shares, then, inasmuch as there is no cash payable by the Company, there is nothing to set off, and in the absence of a registered contract, the Act renders the shares unpaid.”
Buckley, p. 208. H

(8) Purchase with option to pay in cash, effect of.

Where property sold to a Company is to be paid for in cash or in shares at the option of the Company or the vendor, until the option is exercised, the consideration is undetermined, and if it is exercised in favour of shares, there is no payment in cash and the fact that there was an option to pay in cash would not assist the allottee. *Barrow's case*, 14 Ch. D. 492. I

2.—“Unless....writing.”

(1) Writing—Meaning of.

“Writing” includes printing, lithography, photography and other modes of representing or reproducing words in a visible form. See General Clauses Act (X of 1897), S. 3 (58). J

(2) “Duly made in writing”—Meaning of.

The expression—means “made by the contracting party”. *Firmstone's case*, 20 Eq. 524. K

(3) Contract without consideration, void.

A contract under the section must like any other contract, be supported by consideration. *Anderson's case*, 7 Ch. D. 75, 104, 108, 112; *Crickmer's case*, 10 Ch. 614; *Firmstone's case*, 20 Eq. 524. L

(4) Consideration must be stated in the contract.

The contract must also state the consideration. A general description of the nature of the consideration without setting out all the particulars is enough. *Frost & Co.*, (1892) 2 Ch. 556, 560; (1899) 2 Ch. 207; *Watson & Co.*, (1899) 2 Ch. 514; *Markman's case*, (1899) 1 Ch. 414, 429; (1899) 2 Ch. 480. M

(5) Adequacy of consideration will not be inquired into.

(a) Where shares are paid for otherwise than in cash, as where fully paid-up shares are allotted in consideration of property, goods or services received by the Company, the Court will not inquire into the adequacy of the consideration, provided the Company acts honestly, and not colourably and the consideration is not an illusory one. *Ooregam Gold Mining Co. of India v. Roper*, (1892) A.C. 140. N

(b) “The value paid to the Company is measured by the price at which the Company agrees to buy what it thinks worth while to acquire. Whilst transaction is unimpeached, this is the only value to be considered.”
Per Lindely L.J.; in *re Wragg, Ltd.*, (1897) 1 Ch. 830. O

(c) But, if the consideration is merely illusory, or if the transaction is merely a colourable one, entered into for enabling the Company to issue shares at discount, the allottee cannot claim to hold the shares as paid-up. *Re Eddystone Marine Insurance Co.*, (1893) 3 Ch. 9; *Re Innes & Co.*, (1903) 2 Ch. 254; *Ooregam Gold Mining Co. of India v. Roper*, (1892) A.C. 140; *Re Wragg Ltd.*, (1897) 1 Ch. 830. P

2.—“*Unless... writing*”—(Continued).(6) Articles of association—*Not a contract within the section.*

(a) A provision in the articles for the purchase of property and payment for the same in paid-up shares is not a contract within the meaning of the section, though the articles are registered. *Pritchard's case*, 8 Ch. 956. **Q**

(b) A sale in pursuance of those provisions merely, would not entitle the vendor to hold the shares as paid-up. (*Ibid.*) **R**

N.B.—For, the articles are a contract only as between the members *inter se* in respect of their rights as share-holders, and a third party has no right to enforce performance of the contract. *Melhado v. Porto Alegre Railway Co.*, L R. 9 C.P. 503; *Hereford Waggon Co.*, 2 Ch. D. 621; *Rotherham Alum Co.*, 25 Ch. D. 103; *Eley v. Positive Assurance Co.*, 1 Ex. Div 20, 88; *Firmstones case*, 20 Eq. 524. **S.**

N.B.—Even if the vendor be a member, the contract is one between him and his co-members, and not between him and the company, where as the contract contemplated by the section is one between the Company and some person external to it. *Hartley's case*, 10 Ch. 157; *Crickmer's case*, 10 Ch. 614; *Anderson's case*, 7 Ch. D. 104; *Smith v. Brown*, (1896) A.C. 614. **T**

(c) So, a provision in the article that all the original shares should be treated as fully paid-up shares, would not relieve the holder of such shares of his obligation to pay calls. *Crickmer's case*, 10 Ch. 614. **U**

(7) Contract with trustee for a Company—When valid.

(a) A contract made with a trustee for a company about to be formed and adopted by it after incorporation is within the section. *Hartley's case*, 10 Ch. 157; *Carling's case*, 1 Ch. D. 115, 128; *Elsner's case*, (1895) 2 Ch. 759. **V**

(b) A subsequent ratification of such a contract would also, it seems, be valid. *Spilner v. Paris Skating Rink Co.*, 7 Ch. D. 363. **W**

(8) Contract with a trustee for allottee—Validity of.

Similarly, a contract between a Company (or a trustee for the Company) and a trustee or nominee of the allottee is within the section. *New Eberdardt Co., E.P. Men Zies*, 43 Ch.D. 118, 126; *Elsner's case*, (1895) 2 Ch. 759; *Carling's case*, 1 Ch. D. 115, 124. **X**

(9) Description of shares and allottees—Not necessary.

(a) Where shares are issued as paid-up under a contract registered, it is desirable though not necessary, that the shares and the allottees should be so described as to be capable of identification by the persons inspecting the contract, and the register of share-holders. *Pritchard's case*, 8 Ch. 956, 961; *Buenos Ayres Railway Co.*, (1875) W.N. 59; *Hartley's case*, 32 L.T. 106 = 10 Ch. 157. **Y**

(b) It is not necessary that the contract should specify the numbers of the shares so as to identify them. *Delta Syndicate, E. P. Forde*, 30 Ch. D. 153; *Elsner's case*, (1895) 2 Ch. 759, 766; *Kirby's case*, 46 L.T. 682; *Jackson & Co.*, (1899) 1 Ch. 348. **Z.**

2.—“Unless....writing”—(Continued).

Quere.—Whether a person can under the section enter into a contract that in the event of a winding-up he shall set off debts against calls. See *Black & Co's case*, 8 Ch. 254, 261. A

N.B.—Apart from the section, such a contract cannot be entered into. See *Buckle*, p. 209. B

(10) Contract not under the section.

A document purporting to be contract under the section, executed by the Company alone, and not assented to by the other party until after the issue of shares is not a contract under the section. *New Eberhardt Co., E. P. Menzies*, 43 Ch. D. 118. C

(11) Allotment of paid-up shares without registered contract—Effect of.

Where shares are allotted as fully paid-up under an agreement not registered as required by the section, the share-holder cannot hold them as paid-up shares, but is liable for calls in respect of them and in an action to enforce calls the Company cannot be met by the plea that the default to register the contract was that of the Company, and that the Company cannot take advantage of its own wrong. *Preservation Syndicate*, (1895) 2 Ch. 768. See, also, *Crickmer's case*, 10 Ch. 614. D

N.B.—But the original allottee can be made liable as the holder of an unpaid share only when his name has been entered in the register of members with his consent. It is only then that he is a member and is liable to perform his obligations as such. If his name is not thus entered the matter simply rests in contract, and no liability to take unpaid shares could attach. *Barangah Oil Co., Arnot's case*, 36 Ch. D. 702; *Macdonald & Co.*, (1894) 1 Ch. 89. E

(12) “Held,” meaning of.

The word “held” in the section means “originally held.” F

(13) Allotment of paid up shares under unregistered agreement—Effect of transfer by allottee to a person without notice.

(a) If the shares have come into the hands of a *bona fide* purchaser for value, who had no notice of the circumstances affecting the allotment and who acted on the faith of the certificate issued by the Company, declaring the shares to be fully paid-up, the purchaser is entitled to hold them as paid-up shares. *British Farmer's Co.*, 7 Ch. D. 533; *Birkenhead v. Nicolls*, 3 A.C. 1004, 1016; *Turpin's case*, (1877) W. N. 70. G

(b) But, if the purchaser had notice of the vitiating circumstances, neither he nor any subsequent transferee with similar notice can hold the shares as paid-up. *Crickmer's case*, 10 Ch. 614; *Barrow's case*, 14 Ch. D. 432. H

N.B.—A transferee without notice not only has himself a good title to the shares as paid but can give a good title to others. *Buckle*, 9th Ed., p. 205. I

2.—“ Unless . . . writing ”—(Continued).

N.B.—In *Barrow's case*, 14 Ch. D. 432, it was held that once the shares had passed into the hands of a *bona fide* purchaser for value without notice, they were purged of all equities, and not only could he acquire a good title himself, but could give a good title to others whether they were transferees without notice or not. See, also, 17 B. 672. J

N.B.—The decision in *Barrow's case* has been doubted in *London Celluloid Co.*, 39 Ch. D. 190, 197. See also *Railway Tables Co.*; *E.P. Sandys*, 42 Ch. D. 98, 110. K

(14) What constitutes notice.

(a) A person is said to have notice when he has actual knowledge of the facts or would have had such knowledge but for gross negligence in the matter in question. *Hall & Co.*, 37 Ch. D. 712. L

(b) In the absence of gross negligence the mere fact that he might have had knowledge, is not enough to fix him with notice. *Hall & Co.*, 37 Ch. D. 712; *New Chile Gold Co.*, (1892) W.N. 193; *Eddystone Marine Co.*, (1894) W.N. 80. M

(15) Notice to agent binds principal.

A notice to an agent would be sufficient to bind the principal. *Halifax Sugar Co.*, 1891 W.N. 2, 29. N

(16) Purchase in the ordinary course of business—Onus of proving notice.

A purchaser of shares for valuable consideration in the ordinary course of business, raises a presumption that the purchaser had no notice, and the burden of proving that he had notice lies on those who assert it. *Burkinshaw v. Nicolls*, 3 A.C. 1004; *Hall & Co.*, 37 Ch. D. 712. O

(17) Onus of proving purchase in the ordinary course of business.

But the burden of proving that the purchase was made in the ordinary course of business is on those who assert it. *London Celluloid Co.*, 39 Ch. D. 190. P

(18) Transferor's liability after transfer to a person without notice.

(a) *Quære*:—In cases where the transferee can hold the shares as unpaid does not the liability of the transferor upon them continue? *Per Mellish, J.*, in *Spargo's case*, 8 Ch. 407, 410. Q

(b) If the transferor is liable, is he liable as a present member or as past member and is he discharged after a year from the transfer? See *Buckley*, 9th Ed., p. 205. R

(19) Original allottee, sometimes not liable.

(a) Sometimes even an original allottee may hold the shares as paid up, as in *Parbury's case*, (1896) 1 Ch. 100. S

N.B.—In this case “P gave W £500 on W's promise to procure an allotment to to pay 100 fully paid £5 shares in a Company when incorporated. W kept the £500, and procured the allotment to P of 100 shares purporting to be fully paid, but in respect of which the provisions of S. 25 of the English Companies Act (that section corresponding to the present section), had not been complied with, and to which W was entitled under a contract between him and the Company. P sold some of the shares; the Company was held to be estopped, and P was not liable as a contributory.” See *Buckley*, 9th Ed., p. 204. T

2.—“Unless....writing”—(Concluded).

N.B.—“The point of this decision is that P had made no application to the Company for shares, and had no knowledge that they were not legally paid, and that he retained the certificate and dealt with the shares in the faith of the statement made to him by the certificate that the shares were paid”. See *Buckley*, 9th Ed., p. 204. U

(b) Similarly a mortgagee who has advanced money to a Company on the security of some shares, relying on the certificate issued by the Company stating the shares to be fully paid-up is entitled to hold the shares as paid-up shares. *Bloomenthal v. Ford*, (1897) A.C. 156. Y

(c) If shares are issued as fully paid up under a contract not registered, and if it is shown that the allottees were ignorant of the omission to register before the issue, or that they left the matter in the hands of their solicitor and were not aware that any precaution had been omitted, the Court may with the consent of the Company rectify the register by striking off the names of the allottees from the register of members, provided the Company does not become insolvent between the date of the application and the date of rectification. See *Buckley*, p. 210. See also *New Zealand Kapanga Co.*, E.P. Thomas, 18 Eq. 17n; *Denton Colliery Co.*, E.P. Shaw, 18 Eq. 16; *Droitwich Sale Co.*, (1876) W.N. 133; 22 W.R. 767; 43 L.J.Ch. 531; *Dublin Manure Co.*, 13 L.R. (Ir) 198; *Durlington Forge Co.*, 34 Ch. D. 522. W

N.B.—The Court cannot however rectify the register, if persons who became creditors of the Company at a time when the allottee was liable, would be prejudiced by the striking out of his name. *Preservation Syndicate*, (1895) 2 Ch. 768. X

(20) Rectification by Company.

The directors may also in a proper case, do what the Court can do, namely, cancel the allotment; they may then register the contract and re-issue the shares. *Hartley's case*, 18 Eq. 542 = 10 Ch. 157. Y

3.—“Filed....shares.”

(1) Principal contract need not be registered.

Where shares are agreed to be paid for, otherwise than in cash, it is not necessary to file the principal contract; it is enough to file a subsidiary contract stating the nature of the consideration, and providing for the allotment of shares to the persons named in the principal contract, and stating the number and denoting numbers of the shares. See *Re Frost & Co.*, (1889) 2 Ch. 207. Z

(2) Duty of registering the contract.

The obligation of registering the contract is not on the allottee but on the Company. *Barangah Oil Co.*, *Arnot's case*, 36 Ch. D. 702, 708, 711. A

(3) What constitutes issue of shares.

(a) There is an issue of shares, when the share-holder has been completely put in possession of his share though some formal acts may not have been completed. See *E. P. Stark*, (1897) 1 Ch. 532; and *Spitzel v. Chinese Corporation*, 80 L.T. 347. B

(b) To constitute an “issue of shares” it is not necessary that there should be either an allotment of shares or issue of certificate.

3.—“*Filed....shares*”—(Concluded).

N.B.—*Bush's case*, 9 Ch. 554=30 L.T. 458, 737=22 W.R. 658, 699 did not decide that by an issue of shares was meant the issue of the certificate. See *Blyth's case*, 4 Ch. D. 140; *A—G v. Regent's Canal*, (1904) 1 K. B. 263, 270. C

(c) Shares subscribed for in the memorandum of association are “issued” when the Company is registered. *Dalton Time Lock v. Dalton*, 66 L.T. 704. D

(4) Registration not to be antedated.

If a contract under the section is registered subsequent to the issue of shares, the Court cannot order the contract to be treated as having been registered on a date before the issue of the shares. *Harwich Harbour Co.*, (1875) W.N. 235. E

Transfer of Shares.

29. A Company shall, on the application of the transferor of any share or interest in the Company, enter in its register of members the name of the transferee¹ of such share or interest in the same manner and subject to the same conditions as if the application for such entry were made by the transferee.

Transfer may be registered at request of transferor.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 28 of the English Companies (Consolidation) Act of 1908. E-1

1.—“*A Company....of the transferee.*”

(1) Application of section to going Companies.

The section applies to a going Company as well as to a Company in liquidation. See *Burkinshaw v. Nicolls*, 3 A.C. 1004, 1015; *Barangah Oil Co.*, *Arnot's Case*, 36 Ch. D. 702, 710; *Coregam Co. v. Roper*, (1892) A. C. 125; but see *Blyth's Case*, 4 Ch. D. 140. F

(2) Object of the section.

(a) The section is not intended to cast on the transferor the obligation of getting the transfer registered. Its object is to protect the transferor in case the transferee fails to perform his duty of getting the transfer registered. *Skinner v. City of London Insurance Corporation* (1885) 14 Q.B.D. 882. G

(b) The section assumes the right of the transferee to apply for registration and enables the transferor, where the transferee fails to do so, to apply to get the transfer registered. 22 A. 410. See, also, *ex parte Shav*, (1877) 2 Q.B.D. 463; 16 B. 398. H

(3) Duties of transferor.

(a) Where shares are sold, the transferor is only bound to execute a valid transfer and hand it to the transferee. *Skinner v. City of London Insurance Corporation*, (1885) 14 Q.B.D. 882. See, also, 22 A. 410. I

1.—“A Company....of the transferee”—(Continued).

N.B.—There is no warranty on the part of the transferor that the Company will accept the transferee. The transferor is not under any obligation to get the transfer registered. It is the transferee that should get the transfer registered. (*Ibid.*) See, also, *London Founders Association v. Clarke*, (1888) 20 Q.B.D. 576; *Paine v. Hutchinson*, (1868) L.R. 3 Ch. 388. J

(b) But the transferor is under an implied obligation that he will not prevent or delay the registration. *Hooper v. Harts*, (1906) 1 Ch. 549. K

(4) Share—Definition of.

(a) “The proportion of capital to which each member is entitled is his share.” *Lindley on Companies*, 6th Ed., p. 1. L

(b) A share is the interest of a share-holder in the Company measured by a sum of money for the purpose of liability in the first place and of interest in the second, and also consisting of a series of mutual covenants entered into by all the share-holders *inter se* in accordance with ss. 11 and 39. See *Per Farwell, J. in Borland v. Steel Brothers*, (1901) 2 Ch. 288. M

(c) “A share is not a sum of money, but is an interest measured by a sum of money and made up of various rights contained in the contract.” (*Ibid.*) N

(d) “The word ‘share’ does not denote rights only—it denotes obligations also.” *Per Lindley, L.J. in Taylor, Phillips and Rickard’s Case*, (1897) 1 Ch. 305. O

(e) A share in a Company signifies a definite portion of capital, and did not necessarily mean the right of a person whose name was then actually on the register of share-holders. 3 B.H.C.R. (O.C.) 69. O-1

(5) Shares are moveable property.

—capable of being transferred in the manner provided by the regulations of the Company. S. 44, *infra*. P

(6) Nature of rights and obligations that pass on a transfer of shares.

(a) “When a member transfers his share he transfers all his rights and obligations as a share-holder as from the date of the transfer. He does not transfer his rights to dividends or to bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls.” *Per Lindley L.J. in Taylor, Phillips and Richard’s case*, (1897) 1 Ch. 305. Q

(b) On a sale of shares, the purchaser is, in the absence of a contract to the contrary, entitled to all dividends declared after the sale, though they are payable in respect of a period anterior to the date of sale. *Black v. Homersham*, 4 Ex. D. 24. R

(c) Thus, where shares were sold on the 1st of August, and on the 28th of August a dividend was declared for the period ending the 30th of June, the dividend belonged to the purchaser. (*Ibid.*) S

(7) Prescribed form of transfer, to be observed.

The regulations usually prescribe the form of transfer, and in that case the prescribed form must be followed in all essential matters. *Gore Brown*, p. 151; *Evans & Cooper*, p. 27. T

(8) Non-observance of form, in unessential particulars—Effect of.

(a) But non-observance of some unessential matter of form prescribed by the regulations would not affect the validity of a transfer. T-1

1.—“A company...of the transferee”—(Continued).

- (b) Thus, the omission of the address of the transferor, or the denoting number of the share, if both are known to the directors and there can be no ambiguity, is immaterial and will not invalidate a transfer. (*Lethbridge & Christopher, Limited* (1904), 1 Ch. 815). **U**
- (9) **Right of transfer, subject to regulations, absolute.**
- (a) Where the regulations do not impose any restrictions on the power of transfer, share-holders may transfer without any consent, and the directors cannot refuse to register a transfer *bona fide* made. *Smith, Knight & Co.*, *Weston's Case*, 6 Eq. 238; 4 Ch. 20; *Gilbert's Case*, 5 Ch. 559, 565; *Cawley & Co.*, 42 Ch. D. 209; *Pinkett v. Wright*, 2 Hare 120, 130; *Pool v. Middleton*, 29 Beav. 646, 650; *Mexican & South American Co.*, *De Pass's Case* (1859), 4 De G. & J. 544. **Y**
- (b) Thus, a transfer is valid though made by a shareholder to his nominees for the purpose of increasing his voting power. *Stranton Iron Co.*, 16 Eq. 559; *Moffat v. Farquhar*, 7 Eq. 591. **W**
- (c) Even a transfer to a pauper made with a view of the transferor escaping for their liability in the shares transferred is valid. *Taurine Co.*, (1884), 25 Ch. D. 118; *De Pass's Case*, (1859), 4 De G. & J. 544. **X**
- (d) A transfer to a person of small means as trustee for the real purchaser is valid. *King's Case* (1871), 6 Ch. 196; *Massey & Griffin's Case*, (1907), 1 Ch. 582. **Y**
- (e) But such transfers would be void if they are only colourable or made with some reservations of rights to or liabilities of the transferor. *Hyam's Case*, (1860), 1 De G. F. & J. 75; *Battie's Case*, (1870), 39 L.J.Ch. 391; *Chinnock's Case*, (1860), Joh. 714; *Re Discoverer's Finance Corporation*, (1908), 1 Ch. 141, 334. **Z**
- N.B.**—As to the right of share-holders to transfer shares, see further, notes to S. 44, *infra*. **A**

(10) **Who can be a transferee.**

A transfer may be made to any person who is capable of holding shares. *Lumsden's Case*, 4 Ch. 31, 34. **B**

(11) **Transfer to a firm.**

If a transfer is made to a firm in its firm name, and if the transfer is accepted by the company and the name of the firm is entered in the Register of members, the partners of the firm become individually members and are liable for calls. *Weikersheim's Case*, (1873) 8 Ch. 831. See, also, *Dunston's Case* (1894), 3 Ch. 478. **C**

N.B.—“This is not a proper course to pursue, for, the Act requires the names of the members to be entered in the Register, and also the Company may be placed in difficulties, not knowing whether the partnership Articles authorize the taking of shares, nor having the knowledge of the persons who constitute the firm. The Company should, in such a case, require the transfer to be made to the parties by their own names.” See *Gore-Brown and Jordon*, 30th Ed., p. 151 *Neimanu v. Neimanu*, (1889), 43 Ch. D. 198. **D**

(12) **Provision for offering shares to members in the first instance.**

- (a) A provision in the regulations to the effect that a member intending to sell his shares should first offer them to the other members at a fixed price is valid and may be enforced. *Borland's Trustee v. Steel Brothers & Co.*, (1901), 1 Ch. 279; *Attorney, General of Ireland v. Jameson*, (1904), 2 Ir.R.K.B.D. 644. **E**

1.—“A company....of the transferee”—(Concluded).

- (b) “In such a case a sham offer to the other members will not suffice, *e.g.*, where a man offered his shares to his co-members at £ 30, but contemporaneously sold them to a friend at £ 11, the Court of Appeal (in an unreported case) *held* that he had not complied with the provisions of the Articles of Association on the same principles as guided the Court in *Manchester Ship Canal Co., v. Manchester Race Course Co.*, (1901), 2 Ch. 37.” See *Gore Brown, & Jordon*, 30th Ed., p. 156. **F**

(13) Stamp duty on a transfer of shares.

The stamp duty payable on transfer of shares is one quarter of the duty payable on a conveyance for a consideration equal to the value of the share, that is, where the amount or value of the consideration does not exceed Rs. 50, 2 annas. Where it exceeds Rs. 50, but does not exceed Rs. 100, 4 annas. For every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1000, 4 annas; and for every Rs. 500 or part thereof in excess of Rs. 1000, Rs. 1-4-0. See the Indian Stamp Act, II of 1899, Sch. I, Arts. 62 & 23. **G**

(14) Stamp duty, by whom payable.

In the absence of an agreement to the contrary, the expense of providing the proper stamp for the transfer of shares in an incorporated Company shall be borne by the person executing the instrument of transfer. S. 29, Stamp Act. **H**

Share-warrants to Bearer.

30. In the case of a Company limited by shares, the Company, if authorised so to do by its regulations, as originally framed or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up or with respect to stock, issue under their common seal a warrant (hereinafter referred to as a share-warrant) stating that the bearer thereof is entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on such shares or stock.

Warrant of limited shares fully paid up may be issued in name of bearer.

Coupons.

(Notes).

General.

Corresponding English Law.

This section corresponds to cl (1) of S. 37 of the English Companies (Consolidation) Act of 1908.

(1) Particulars of share warrants.

—should be contained in the annual summary of the Company. See S. 49, *infra*. **I**

(2) Stamp duty on share warrants.

For the amount of stamp duty payable on share warrants, see the Indian Stamp Act (II of 1899) Sch. I, Art. 59. **J**

31. A share-warrant shall entitle the bearer thereof to the shares or stock specified therein; and such shares or stock may be transferred by the delivery of the share-warrant.

Effect of share-warrant.

(Note)

General.

Corresponding English Law.

This section corresponds to cl (2) of S. 87 of the English Companies (Consolidation) Act of 1908.

32. The bearer of a share-warrant shall, subject to the regulations of the Company, be entitled, on surrendering such warrant for cancellation, to have his name entered as a member in the register of members ¹; and the Company shall be responsible for any loss incurred by any person by reason of the Company entering in its register of members the name of any bearer of a share-warrant in respect of the shares or stock specified therein without the share-warrant being surrendered and cancelled.

Re-registration of bearer of a share warrant in the register.

(Notes).

General.

Corresponding English Law.

This section corresponds to cl (3) of S. 37 of the English Companies (Consolidation) Act of 1908.

1.—“The bearer....in the register of members.”

Right of bearer of share warrant to be registered, subject to Regulations.

Though the bearer of a share warrant is entitled on surrendering the warrant, to be registered as a member, the Company may make regulations as to the date when registration shall take effect, and the conditions to be fulfilled before registration can be claimed. *Anglo-Dutch Exploration* (1902) July; *unreported*. See Evans and Cooper, p. 45. **K**

33. The bearer of a share-warrant may, if the regulations of the Company so provide, be deemed to be a member of the Company within the meaning of this Act, either to the full extent or for such purposes as may be prescribed by the regulations :

Regulations of the Company may make the bearer of a share-warrant a member.

Provided that the bearer of a share-warrant shall not be qualified in respect of the shares or stock specified in such warrant for being a director or manager of the Company in cases where such a qualification is prescribed by the regulations of the Company ¹.

(Notes).

General.

Corresponding English Law.

This section corresponds to cl (4) of S. 37 of the English Companies (Consolidation) Act of 1908.

1.—“Provided....regulations of the Company.”

Quere.—Whether the possession of share warrants would not be a qualification for directorship if the articles expressly so provide. See *Pearson's* case, 4 Ch. D. 222 = 5 Ch. Div. 336. L

34. On the issue of a share-warrant in respect of any share or stock, the Company shall strike out of its register of members the name of the member then entered therein as holding such share or stock, as if he had ceased to be a member, and shall enter in the register the following particulars :

Entries in register
where sharewarrant
issued.

- (a) the fact of the issue of the warrant ;
- (b) a statement of the shares or stock included in the warrant, distinguishing each share by its number ;
- (c) the date of the issue of the warrant.

(Notes).

(General).

Corresponding English Law.

This section corresponds to cl (5) of S. 37 of the English Companies (Consolidation) Act of 1908.

35. Rep. Indian Stamp Act, 1899 (II of 1899).*Change of Name.*

36. Any Company under this Act, with the sanction of a special resolution of the Company passed in manner hereinafter mentioned ¹, and with the approval of the Local Government testified in writing under the hand of one of the Secretaries to such Government, may change its name ; and, upon such change being made, the Registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case ; but no such alteration of name shall affect any rights or obligations of the Company, or render defective any legal proceedings instituted or to be instituted by or against the Company ; and any legal proceedings may be continued or commenced against the Company by its new name

Power of Companies
to change name.

that might have been continued or commenced against the Company by its former name.

Explanation.—The issue of the certificate of incorporation is necessary to complete the change of name.

(Notes).

General.

Corresponding English Law.

This section corresponds to cls. (3), (4), & (5) S. 8 of the English Companies (Consolidation) Act of 1908.

1.—“With the sanction....mentioned.”

(1) Irregularity in passing special resolution—Effect of.

If the special resolution in pursuance of which the Company has changed its name was not properly passed, the registration of the new name should be vacated. *Australasian Mining Co.*, (1893) W.N. 74; 68 L.T. 437. M

N.B.—For the definition of the term special resolution, see S. 77, *infra*. N

Articles of Association.

37. The memorandum of association may, in the case of a Company limited by shares, and shall, in the case of a Company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the Company as the subscribers to the memorandum of association deem expedient 1.

The articles shall be expressed in separate paragraphs, numbered consecutively. They may adopt all or any of the provisions contained in the table marked A in the first schedule hereto 2. They shall, in the case of a Company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the Company proposes to be registered, and in the case of a Company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the Company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration.

In a Company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

(Notes).

General.

Corresponding English Law.

The first two paragraphs of this section except the first sentence of the second paragraph correspond to S. 10 of the English Companies (Consolidation) Act of 1908. The first sentence of the second paragraph corresponds to S. 12 cl (b) of the English Act, while the last paragraph of the Indian Act corresponds to S. 4, cl (2) (ii) & (iii), and S. 5 cl. (2) (i) & (ii) of the English Act.

1.—“Articles of association....expedient.”

(1) Articles of Association—Nature of.

- (a) The articles of association govern the internal affairs of the Company and may be termed the bye-laws of the Company. See Gore-Brown, & Gordon, 30th Ed., p. 37. **O**
- (b) The articles constitute an agreement between the members *inter se*, and would not enable an outsider to sue the Company for a breach of the provisions therein. *Eley v. Positive Assurance Co.*, (1876) 1 Ex. D. 88. **P**
- (c) “They play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of the Company, and so, accepting it, define the duties, rights, and powers of the governing body as between themselves and the Company at large, and the mode and form in which changes in the internal regulations of the Company may from time to time be made.” *Per Lord Cairns in Ashbury Carriage Co. v. Riche*, (1875) 7 H.L. 653. **Q**
- (d) The articles, however, cannot take away the powers which the members are given by the Act. Thus, a provision in the articles that in case of re-construction, dissenting members shall not have the right conferred by S. 204, *infra*, is invalid. See *Payne v. Cork Co.*, (1900) 1 Ch. 308. **R**
- (e) “The articles must not contain anything illegal or *ultra vires* the Company.” Topham, 2nd Ed., p. 51. **S**

(2) Articles—Functions of.

The Articles of Association perform a two-fold function :—

- (1) They define the duties and powers of the directors ;
- (2) They ensure that all who deal with the directors shall have notice of the precise limits of their authority. *Small v. Smith*, (1884), 10 A.C. at p. 138. **T**

(3) Articles cannot override memorandum.

Where the provisions of the memorandum are inconsistent with those of the articles, the former should prevail. *Wedgwood Coal and Iron Co., Anderson's case*, (1878) 7 Ch. D. 75. **U**

(4) Articles may explain memorandum.

But the articles may be useful to explain the memorandum where its provisions are ambiguous. *Capital Fire Insurance Association*, (1882) 21 Ch. D. 209. **Y**

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The articles shall be expressed in separate paragraphs, numbered consecutively. They may adopt all or any of the provisions contained in the table marked A in the first schedule hereto ². They shall, in the case of a Company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the Company proposes to be registered, and in the case of a Company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the Company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration.

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But the articles may be useful to explain the memorandum where its provisions are ambiguous. *Capital Fire Insurance Association*, (1892) 21 Ch. D. 209. Y

1.—“Articles of association....expedient”—(Concluded).

(6) Articles, alterable by special resolutions.

A Company can, by special resolution, alter its regulations contained in the articles of association, or in Table A, where that table is applicable to the Company. See S. 76, *infra*. W

N.B.—After registration, the articles can be altered only by a special resolution under S. 76, and the Court has no jurisdiction to rectify the articles on the ground of mistake or otherwise. See *Evans v. Chapman*, (1902) 86 L. T. 381. X

(6) Articles, defect of signature, whether curable.

Though the articles are not signed by the subscribers of the memorandum, still, if they have been registered, and the Company acts upon them, they will be deemed valid. *Ho Tung v. "Manon" Insurance Co.*, (1902) A. C. 232. Y

(7) Imputation of knowledge of articles.

(a) Articles of association are public documents, and persons dealing with the Company will be presumed to have notice of any limitations contained in the articles, and contracts made must be construed accordingly. *Griffith v. Paget*, (1877) 6 Ch. D. 511. See, also, *Ernest v. Nicholls*, (1858) L. R. 6 H. L. 401 to 419. *Fountaine v. Carmarthen Railway Co.*, (1868) L. R. 5 Eq. 322; *Pierce v. Jersey Waterworks Co.*, (1870) L. R. 5 Ex. 209.; *Irvine v. Union Bank of Australia*, (1877) 2 App. Ca. 366; *Chapleo v. Brunswick Building Society*, (1881) 6 Q. B. D. 696. Z

(b) Persons the dealing with Company, are bound to read the registered documents, and see that the proposed dealing is not inconsistent therewith. *Royal British Bank v. Tarquand*, (1856) 6 E & B 327. A

(c) But they need not inquire into the regularity of the internal proceedings. (*Ibid.*) B

(d) “If the directors have power and authority to bind the Company, but certain preliminaries are required to be gone through on the part of the Company before that power can be duly exercised, then, the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do.” *Per Selwyn L.J. in Land Credit Co. of Ireland* (1869), 4 Ch. App. at p. 469. C

(e) “So long as the Act is not inconsistent with the memorandum and the Articles, an outsider is not bound to inquire whether all the necessary steps have been taken, that is, he is entitled to assume that the directors have acted properly” *Topham*, 2nd Ed., p. 54. D

(f) The directors of a Company who had power to issue bonds if authorized by a special resolution, issued a bond to T without a special resolution. *Held*, T could sue on the bond, for, he was entitled to assume that the necessary resolution had been passed. (*Ibid.*) See, also, *Dink v. The Tower Galvanizing Co., Limited*, (1901) 2 K.B. 314. E

(g) But, if the person dealing with the Company has notice of the irregularity, he will be affected with it. *Howard v. Patent Ivory Co.*, (1883) 38 Ch. D. 156 at pp. 170, 171. F

2.--"They may adopt....schedule hereto."

(1) Article substantially identical with a provision in table A—Validity of.

Having regard to the provisions of this section, and the next section, an article which is substantially the same as a provision in Table A, cannot be *ultra vires*. *Löck v. Queensland Mortgage Co.*, (1896) A.C. 461. **G**

(2) Stamp duty on articles.

The stamp duty payable on articles of association of a Company is Rs. 25. But the articles of an association not formed for profit and registered under S. 26, *supra*, are duty-free. See Indian Stamp Act (II of 1899), Sch. I, Table-A, Art. 10. **H**

38. In the case of a Company limited by shares, if the memo-

Application of
table A. random of association is not accompanied by articles of association or, in so far as the articles do not exclude or modify the regulations contained in the table marked A in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the Company, in the same manner and to the same extent as if they had been inserted in articles of association and the articles had been duly registered.

(Note.)

(General).

Corresponding English Law.

This section corresponds to S. 11 of the English Companies (Consolidation) Act of 1908.

39. The articles of association shall be printed, and shall be

Signature and
effect of articles of
association. signed by each subscriber in the presence of, and be attested by, one witness at the least¹.

When registered, they shall bind the Company and the members thereof² to the same extent as if each member had subscribed his name thereto and as if such articles contained a contract on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles subject to the provisions of this Act.

All moneys payable by any member to the Company in pursuance of the conditions and regulations of the Company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the Company.

(Notes).

General.

Corresponding English Law.

The first paragraph of this section corresponds to S. 12 (a) & (d), while the rest of the section corresponds to S. 14 of the English Companies (Consolidation) Act of 1908.

A power to borrow on a mortgage will justify a mortgage the object of which is in part to cover previously incurred liabilities. 9 C. 14 (31). **I**

1.—“*Signed....at the least.*”**Attesting witness, not to be a subscriber.**

The attesting witness must be a disinterested person, and shall not himself be a subscriber. Gore Brown & Jordon, 30th Ed., p. 29. J

2.—“*When registered....thereof.*”**(1) Articles—Want of signature, whether curable by registration.**

Articles of association which, though unsigned, have been registered and have for a number of years been acted upon by the Company, would be deemed valid. *Ho Tung v. "Manon" Insurance Co.*, (1902) A.C. 232. K

(2) Member, when can allege ignorance of contents of articles.

In the absence of fraud, a person who has taken shares cannot allege ignorance of the contents of the memorandum or articles on the ground that he had not signed or sealed them. But, if a person who has neither signed nor sealed the memorandum or articles, has been fraudulently induced to take shares, and had at the time no notice of their contents the section would not preclude him from alleging ignorance of their contents, so as to protect those by whose fraud he was prevailed upon to take shares. *Directors &c. of Central Railway Co., of Venezuela v. Kisch*, L.R. 2 H.L. 99, 123; *Downes v. Ship*, L.R. 3 H.L. 343. L

General Provisions.

40. The memorandum of association, and the articles of association, if any, shall be delivered to the Registrar of Joint-Stock Companies hereinafter mentioned, who shall retain and register the same ¹. It is not his duty to require evidence as to whether the several subscribers to a memorandum of association so delivered are competent to contract.

There shall be paid to the Registrar by a Company having a capital divided into shares, in respect of the several matters mentioned in the table marked B in the first schedule hereto, the several fees therein specified, or such smaller fees as the Governor General in Council may from time to time direct, and by a Company not having a capital divided into shares, in respect of the several matters mentioned in the table marked C in the first schedule hereto, the several fees therein specified, or such smaller fees as the Governor General in Council may from time to time direct.

All fees paid to the said Registrar in pursuance of this Act shall be accounted for to Government.

(Notes).

General.

Corresponding English Law.

The first sentence of the first paragraph of this section corresponds to S. 15 of the English Companies (Consolidation) Act of 1908. The English Act contains no provision corresponding to the second sentence of the first paragraph.

The second and third paragraphs of the section correspond to S. 244 of the English Act. **L1**

I.—“The memorandum....same.”

(1) Memorandum to be in correct form when presented for registration.

“The memorandum must be in correct form when presented for registration and any alterations and interlineations in it, should be initialled by each subscriber, or the witness should certify that the alterations were made before the document was executed.” *Gore Brown and Jordan*, 30th Ed., p. 80. **M**

(2) Memorandum to be properly stamped.

The memorandum should be properly stamped before it can be registered. For the amount of duty payable on a memorandum, see Art. 89, Sch. I of the Indian Stamp Act II of (1899). **N**

(3) Restrictions on the appointment of directors by the articles—English Law.

(a) Under the English Law a person shall not be capable of being appointed a director by the articles, unless he has signed and filed with the Registrar a consent in writing to act as such director, and has either signed the memorandum for the qualification shares (if any), or has signed and filed with the Registrar a contract in writing to take from the Company and pay for such shares. See S. 72 (1), Companies (Consolidation) Act, 1908. **O**

(b) On the application for registration of the memorandum and articles of a Company, the applicant shall deliver to the Registrar a list of the persons who have consented to be directors of the Company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding fifty pounds. See S. 72 (2), Companies (Consolidation) Act 1908. **P**

(4) Inspection of registered documents.

Every person may inspect the documents kept by the Registrar of Joint Stock Companies, on payment of such fees not exceeding one rupee for each inspection, as may be prescribed by the Local Government. See S. 220 (e), *infra*. **Q**

(5) Certified copies of registered documents.

Any person can, on payment of the prescribed fees, obtain a certificate of the incorporation of a company or a copy or extract of any other document, or any part of any other document, to be certified by the Registrar. (*Ibid.*) **R**

41. Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this Act or by the desire of the parties to be registered, the Registrar shall

Effect of registration.

certify under his hand that the Company is incorporated ¹, and in the case of a limited Company that the Company is limited; the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the Company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated Company, and having perpetual succession and a common seal ², but with such liability on the part of the members to contribute to the assets of the Company, in the event of the same being wound up, as is hereinafter mentioned. ³

A certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with ⁴.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 16 and the 1st clause of S. 17 of the English Companies (Consolidation) Act. R1

I.—“Upon the registration . . . is incorporated.”

(1) Effect of registration.

- (a) The legal entity created by registration is a corporate body totally distinct from the persons composing it. The Company is at law a different person altogether from the subscribers to the memorandum. *Saloman v. Saloman & Co.*, (1897) A. C. at p. 51; see, also, *Kodak Limited v. Clark*, (1903) 1 K. B. 505. S
- (b) Hence a person can sell property to a Corporation of which he is a member. Such a sale is neither in form nor in substance, a sale to himself. *Farrar v. Farrars Limited*, 40 Ch. D. 395. T
- (c) Likewise, a sale by a Corporation to one of its members is valid, and cannot be impeached on the ground that the resolution in pursuance of which the sale was effected was carried by the vote of that member at the general meeting. *North West Transportation Co. v. Beatty*, 12 A. C. 589. U
- (d) A firm can transfer its assets to a Corporation consisting exclusively of the partners. *Ryhope Coal Co. v. Fryer*, 7 Q. B. D. 485, 489; see, also, *Wenlock v. River Dee Co.*, 36 Ch. D. 676-n, 686-n 682-n. Y

N.B.—In such a case the business of the firm is determined, though it is continued by the Corporation. *Prescott v. Bank of England*, (1894) 1 Q. B. 351. W

(2) Registration, after winding up—Effect of.

The registration of a Company after the presentation of a petition to wind it up is a mere nullity. *Per Malins v. C. in Hercules Insurance Co.*, 11 Eq. 321. X

1.—“Upon the registration....is incorporated”—(Concluded).

(3) Proof of incorporation otherwise than by the certificate.

If the certificate of incorporation is not forthcoming, the fact of incorporation may be proved *aliunde*. 3 B.H.C. O.C. 106. Y

(4) Date of incorporation.

“The date of the certificate is, as a rule, the date at which the documents are left for the first official examination and the duty and fees paid upon them, although the certificate is not actually prepared, signed and issued until after the documents have passed a second official examination, and no impediment to registration has been found.” *Gore-Brown and Jordon*, 80th Ed., p. 8 (F-N.). Z

2.—“Capable forthwith....common seal.”

(1) Company's power to hold lands.

S. 16 of the English Companies (Consolidation) Act, 1908, provides, that, on the issuing of the certificate of incorporation, the Company shall have, among other powers, the “power to hold lands.” The object of this provision is to exclude the effect of the Mortmain Acts which prohibit conveyance of lands, to Corporations, except under a power conferred by Royal Charter or Act of Parliament. The Statutes of Mortmain do not apply to India; hence the Indian Companies Act does not contain any express provision empowering Companies registered under the Act to hold lands. In spite of the absence of such provision, a Company registered under the Act, can hold lands, as a Company registered under the English Act. See *Mayor of Lyons v. East India Company*, 1 M.L.A. 175. A

(2) Authority to use the Company's seal.

A person having the authority to manage the affairs of a Company has an implied power to use its seal. *Re Contract Corporation*, (1868) 3 Ch. 105, 116; *Biggerstaff v. Rowatts Wharf*, (1896) 2 Ch. 98. B

(3) Seal, how proved.

(a) A seal may be proved by any person who knows it, and it is not necessary to call a person who saw it affixed. *Moises v. Thornton*, (1799) 8 T. R. 307; see, also, *Brownker v. Atkins*, (1881) Skinn. 2. C

(b) A document bearing a Company's seal, will be presumed to have been duly sealed, and the burden of proving that the seal was not regularly affixed lies on those who assert it. *Clark v. Imperial Gas Co.*, (1883) 4 B. & Ad. 315; *Anon*, 12 Mod. 423. D

(4) Attestation of affixing the seal, when necessary.

Unless the regulations provide otherwise, the affixing of the seal of a Corporation, need not be attested. *Gore-Brown and Jordon*, 80th Ed., p. 69.

N.B.—The articles usually contain provisions as to the occasions on which the seal shall be used. (*Ibid.*), p. 70. E

(5) Forgery with Company's seal.

(a) If the Company's seal is affixed to a document wrongfully and without the Company's authority the document is a forged one, and the Company incurs no liability unless the circumstances are such as to create an estoppel. See *Ruben v. Great Fingall Consolidated Co.*, (1904) 2 K.B. 712; (1906) App. Cas. 429. F

2.—“Capable forthwith....common seal”—(Continued).

- (b) Thus, where a secretary wrongfully affixed the Company's seal to share certificates; and having forged the names of two directors issued the certificates apparently in the ordinary course of business, held, the Company incurred no liability to the holders of certificates even though their possession was *bona fide*. (*Ibid.*) **G**
- (c) The Company would not be estopped by its negligence unless the negligence is in or immediately connected with the act by which the loss arises. *Bank of Ireland v. Trustees of Evans' Charities*, 5 H.L.C. 389; *Staple of England v. Bank of England*, 21 Q.B. Div. 160; see, also, *Vagliano v. Bank of England*, 22 Q.B.D. 108=23 Q.B. Div. 243=(1891) A.C. 107. **H**
- (d) If a document be sealed under the authority of a meeting of directors in which the necessary *quorum* was not present, the document would be good, as between the Company and persons dealing with it without notice of the irregularity. *County of Gloucester Bank v. Rudry Colliery Co.*, (1895) 1 Ch. 629. See, also, *Royal British Bank v. Turquand*, (1856) 6 E. & B. 327. **I**

(6) Suits by and against Corporations.

- (a) A Corporation can sue for damages in tort for a libel affecting its reputation. *S. Hetton Coal Co. v. North Eastern News Co.*, (1894), 1 Q.B. 183. **J**
- (b) It may be likewise sue for injury sustained by an imputation of insolvency. *Metropolitan Saloon Co. v. Hawkins*, 4 H. & N. 90. See, also, *Quartz Hill Co. v. Eyre*, 11 Q.B.D. 674. **K**
- (c) An action lies against a Corporation for malicious prosecution. See *Bank of N.S.W. v. Oveston*, 4 A.C. 270; *Bank of N.S.W. v. Piper*, (1897) A.C. 389; *Cornford v. Carlton Bank*, (1899) 1 Q.B. 392=(1900) 1 Q.B. 22. **L**
- (d) It may also be sued for a malicious libel. *Nevil v. Fine Art Agency*, (1895) 2 Q.B. 156, 172=(1897) A.C. 68; *Citizens Co. v. Brown*, (1904) A.C. 423. **M**
- (e) It is liable to be prosecuted for breach of a statutory duty. *Reg. v. Tyler*, (1891) 2 Q.B. 588; *Lawler v. Egan*, (1901) 2 Ir. Rep. 589.
- N. B.**—But, it cannot be guilty of corrupt practices. *Manchester v. Williams*, (1891) 1 Q.B. 94. **N & O**
- (f) A Company cannot sue or be sued in the name of an officer or trustee, unless it is so authorised, and such authority can only be conferred by an Act of Parliament, or by an Act of the Indian Legislature. **P**
- (g) A Company duly registered under the Act is a Corporation, and being a corporation, though a suit must be brought in the registered name of the Company, the plaintiff may be verified by a Secretary, Director or other principal officer. (*Ibid.*) **Q**
- (h) A suit by a Company not registered under the Act is badly framed if the plaintiff is verified by a principal officer on behalf of the Company and should be dismissed. (*Ibid.*) **R**
- (i) A suit against a Company not registered under the Act must implead all the members as defendants. 21 A. 346. **S**

2.—“Capable forthwith....common seal” —(Concluded).

(7) Contracts with corporations.

(a) A corporation can enter into contracts and take apprentices. *Burnley Equitable Society v. Casson*, (1891), 1 Q.B. 75; *R. v. Pharmaceutical Soc.*, (1899) 2 Ir. Rep. 132. T

(b) It may be appointed a trustee. *Thompson v. Alexander*, (1905), 1 Ch. 229. T1

(c) A contract entered into with a company may be assigned by it to an individual. *Tolhurst v. Associated Cement Makers*, (1902), K.B. 600=(1903) A.C. 414. U

(d) Similarly, a contract entered into with an individual may be assigned by him to a company. *Kemp v. Baerelman*, 1906, 2 K.B. 604.

N. B.—“But in each case the matter has to be decided on the facts.” *Buckley*, 9th Ed., p. 29. Y

3.—“With such liability....mentioned.”

N. B.—As to the liability of present and past members and the directors and managers to contribute to the assets of a company in a winding up, see Ss. 61 & 62, *infra*.

4.—“A certificate....complied with.”

(1) Conclusive effect of certificate of Incorporation—Difference between English and Indian Law.

(a) Under this section the certificate of incorporation is conclusive evidence only of the fact that the requisitions of the Act with respect to registration have been complied with. This provision follows S. 16 of the English Companies Act of 1862. But, the English law has been altered by the Companies Act of 1900, S. 1 (1) of which (=S. 17 (1) of the Consolidation Act, 1908) provides that a certificate of incorporation is conclusive evidence that the requirement of the Act not only in respect of registration but also in respect of matters precedent and incidental thereto have been complied with and that the association is a company authorized to be registered and duly registered under the Act. Y1

(b) Under the Indian Act as under the English Act of 1862, if the memorandum is signed by less than 7 persons, the defect would not be cured by the certificate of incorporation. But, such a defect would be cured by a certificate of incorporation granted under S. 17 (1) of the Consolidation Act 1908 (=S. 1 (1) of the Companies Act, 1900). See *Nat. Deb. Corp.* (1891), 2 Ch. 505; *Ladies' Dress Assoc. v. Pulbrook*, (1900), 2 Q.B. at p. 381. W

(c) Under the English Law a contract with an infant is not void, but only voidable, and may be ratified by him on attaining majority. So, if a memorandum is signed by seven persons of whom one is an infant, and the memorandum is registered, no objection can be taken on the ground that one of the signatories was only an infant. But it is conceived, the case would be different under the Indian Law. Here, the contract of an infant is not merely voidable, but is simply void; it cannot be made good by subsequent ratification. Hence, a signature of the memorandum by an infant is void, and if there are only seven signatories of whom one is an infant, the defect cannot be made good by the issue of the certificate of incorporation. See 30 C. 539 (P.C.), followed in 26 A. 342. X

4.—“A certificate....complied with”—(Concluded).

- (d) The English law also requires a statutory declaration to be produced by a solicitor or law-agent engaged in the formation of the company or by a person named in the articles as a director or secretary, that all or any of the requirements of the Act in respect of registration and of matters precedent and incidental thereto have been complied with, and the Registrar may accept such a declaration as sufficient evidence of compliance. S. 17 (2) Comp. (Consolidation) Act 1908. Y

42. A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of such sum, not exceeding one rupee, as may be prescribed by the Company for each copy; and if any Company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member in pursuance of this section, the Company so making default shall for each such offence incur a penalty not exceeding twenty rupees.

Copies of memorandum and articles to be given to members.

(Note).

General.

Corresponding English Law.

This section corresponds to S. 18 of the English Companies (Consolidation) Act of 1908. Y1

43. No Company shall be registered under a name identical with that by which a subsisting Company is already registered, or so nearly resembling the same as to be calculated to deceive¹, except in a case where such subsisting Company is in the course of being dissolved and testifies its consent in such manner as the Registrar requires.

Prohibition against identity of names in Companies.

If any Company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting Company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned Company may, with the sanction of the Registrar, change its name; and, upon such change being made, the Registrar shall enter the new name on the register in the place of the former name and shall issue a certificate of incorporation² altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the Company, or render defective

any legal proceedings instituted or to be instituted by or against the Company, and any legal proceedings may be continued or commenced against the Company by its new name that might have been continued or commenced against the Company by its former name.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 8 of the English Companies (Consolidation) Act of 1908. Y2

1.—“No company....to deceive.”

(1) Application of the section.

- (a) The section forbids registration of a company in the name of a subsisting company that is already *registered*, and does not apply to cases where a company proposes to be registered in the name of a subsisting company that is *unregistered*. See Buckley, 9th Ed., p. 14. Z
- (b) “So soon as the new company is registered the section has, except as for change of name, ceased to be applicable; the old registered company cannot upon the section claim an injunction to restrain the newly registered company from trading in the name.” (*Ibid.*) A
- (c) “The Act forbids registration in the same or a similar name irrespective of whether the business to be carried on is the same or not.” (*Ibid.*) B

(2) Prohibition against use of similar names—Rules under general Law.

- (a) Under the general law though not under the Act, a company, whether registered or not, may sue to restrain the registration of another company in its own name or in a name so similar to its name as to be calculated to deceive, if the new company proposes to carry on business similar to that of the existing company. See *Hendricks v. Montagu*, 17 Ch. D. 638; see, also, *Madam Tussaud & Sons, Lim. v. Tussaud*, 44 Ch. D. 678; *Hoby v. Grosvenor Library Co., Lim.* 28 W.R. 386. C
- (b) The rules that apply to individuals trading under identical or similar names also apply to companies. *Merchant Banking Co. of London v. Merchant's Joint Stock Bank*, (1878) 9 C.D. 560. D
- (c) The fact that registration has been accomplished, and that the Registrar took no objection to registration, will not prevent the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company, under a name calculated to deceive the public. *Huntley & Palmer v. Reading Biscuit Co.*, (1893), 9 Times L.R. 462. *Merchant Banking Co. of London v. Merchant's Joint Stock Bank*, 9 Ch. D. 560; *Guardian Fire and Life Assurance Co. v. Guardian and General Insurance Co.*, 50 L.J. (Ch) 253; *Accident Insurance Co. v. Accident Disease and general Insurance Corporation*, 54 L.J. (Ch.) 104 = 51 L.T. 597. E

1.—“No company....to deceive”—(Continued).

(d) “The jurisdiction in these cases rests either upon fraud or upon property; not that there is property in the name, but that the use of a name in which another carries on business will deceive and will affect property by diverting customers to the person taking the name.” Buckley, p. 14. F

(e) An injunction may be granted against a company to restrain it from using a name similar to that of an existing company, where such use is calculated, though not intended, to deceive. *Manchester Brewery v. North Cheshire and Manchester Brewery*, (1898), 1 Ch. 539.

N. B.—“Where the application is under the section it is material to consider (1) what business has been or is to be carried on by the plaintiff-company, and what is to be carried on by the new company, and (2) what sort of name has been adopted by the plaintiff company.” Buckley, 9th Ed., p. 15. G

(3) Individual trading in his own name.

An individual can carry on business in his own name in spite of the fact that his name is identical with or similar to the name of an existing company or individual. *Turton v. Turton*, (1889), 42 C.D. 128; *Burgess v. Burgess*, (1858) 22 L.J. Ch. 675. H

(4) Individual lending his name to a company—When prohibited.

But an individual would not be permitted to give his name to a company for the purpose of enabling it to carry on business under a name similar to that of an existing company, where the adoption of the name is calculated to deceive the public. *Madam Tussaud & Sons, Limited v. Tussaud*, 44 Ch. D. 678. See, also, *Massam v. Thorley's Cattle Food Co.* 14 Ch. D. 748. I

N. B.—It would be prudent before lodging the necessary documents for registration, to submit the name proposed to the Registrar, asking whether any objection exists to the registration of a company under that name. *Nicolas & Lawrence*, 3rd Ed., p. 23.

(5) Prohibition against the use of the name of a foreign company.

An injunction may be granted even to a foreign company having no agency in this country, to restrain a company registered in this country, from using the name of the foreign company, in a way calculated to deceive. See *Societe Panhardet Levassor v. Panhard Levassor Co.*, (1901), 2 Ch. 513. J

(6) Use of descriptive names.

(a) There is no monopoly in names which are merely descriptive and a company cannot, by appropriating a descriptive name or title, prevent the adoption of that name by another company. *Aerators, Ltd. v. Tollit*, (1902), 2 Ch. 319; see, also, *Cellular Clothing Co. v. Maxton*, 1899, A.C. 326. K

1.—“No company....to deceive”—(Concluded).

N.B.—A descriptive name may be one which is descriptive of the articles dealt in, or of the locality of the place of business, or of the nature of the business carried on, or of a particular process. See *Nicolas & Lawrence*, 3rd Ed., p. 24.

(b) “It would obviously lead to the greatest inconvenience if any company could prevent all other companies from using as part of their title the one word in the English Language which aptly describes the articles they manufacture or deal in.....For example, suppose a company had registered the name of ‘Motors, Limited,’ and another the name of ‘Automobiles, Limited,’ it appears to me impossible to say they thereby prevent all other companies from using as part of their title, these two words, which, so far as I know, are the only words which represent the fashionable locomotives of the day, although their sole trade was the manufacture and sale of motors and automobiles.” *Per Farewell, J., in Aerators, Ltd. v. Tollit*, (1902), 2 Ch. at p. 823. L

(c) But the use of a descriptive name may be so general or rather so universal as to give it a secondary meaning and to confer on the person who has so used it a right to its exclusive use, or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. (*Per Lord Shinnid Cellular in Clothing Co. v. Maxton*, 1899, A.C. at p. 340). M-R

(d) A descriptive name will not be allowed to be used in a way calculated to deceive the public whether or not there has been an intention to deceive. *Reddaway v. Banham*, (1896) A.C. 199; *North Cheskire and Manchester Brewery Co.*, (1899) A.C. 83=1898, 1 Ch. 539. S

(e) Thus, an injunction was granted in favour of a person who had been carrying on business for a long time under the style of “The Grosvenor Library” to restrain the defendants from carrying on or advertising a similar business under that name. *Hoby v. Grosvenor Library Co., Limited*; 28 W.R. 386. T

(7) Use of fancy or invented names.

(a) The principles applicable to the sale of goods under a descriptive name do not apply to sale of goods under a fancy or invented name. *Cellular Clothing Co. v. Maxton*, (1899) A.C. at p. 339. See, also, *British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, 1907, 2 Ch. 312. U

(b) Where a person uses in the sale of his goods a fancy invented name used by another, it is almost, if not altogether, impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer. *Per Lord Shand. (Ibid.)* V

2.—“Shall issue a certificate of incorporation.”

Change of name when complete.

A change of name is complete only when the new name is entered on the register in the place of the former name and a new certificate of incorporation is issued. *Shackleford, Ford & Co. v. Dangerfield*, L.R. 3 C. P. 407. See, also, Explanation to S. 36, *supra*. W

PART II.

DISTRIBUTION OF CAPITAL AND LIABILITY OF MEMBERS OF
COMPANIES AND ASSOCIATIONS UNDER THIS ACT.*Distribution of Capital.*

44. The shares or other interest of any member in a Company under this Act shall be moveable property, capable of being transferred in manner provided by the regulations of the Company ¹, and shall not be of the nature of real estate or immoveable property; and each share shall, in the case of a Company having a capital divided into shares, be distinguished by its appropriate number ².

Nature of interest
in Company.

(Notes).

(General).

Corresponding English Law.

This section corresponds to S. 22 of the English Companies (Consolidation) Act of 1898.

1.—“The shares.... of the Company.”**(1) Moveable property—Definition of.**

For the definition of moveable property, see General Clauses Act (X of 1897) S. 9 (34). X

(2) Shares are generally transferable.

(a) By virtue of this section, shares in an incorporated company, unlike the interest of partners in a firm, are freely transferable, subject only to such restrictions as may be imposed by the regulations. See *Buckley*, p. 85. Y

N.B.—For the definition of ‘share’ see notes under S. 29. *supra*. Z

(b) Where the regulations impose no restrictions on the right of transfer, shareholders can freely transfer their shares without obtaining the consent of the directors, and the directors cannot refuse to register a transfer *bona fide* made. *Smith, Knight & Co, Weston’s case*, 6 Eq. 238; 4 Ch. 20; *Gilbert’s case*, 5 Ch. 559, 565; *Cawley & Co.* 42 Ch. D 209; *Pinket v. Wright*, 2 Hare 120, 130; *Poole v. Middleton*, 29 Beav. 646, 650; *Stranton Iron Co.*, 16 Eq. 559; *Moffat v. Farquhar*, 7 Ch. D. 591. A

(c) Thus, the directors cannot refuse to register a transfer made by a shareholder to his nominees so as to increase his voting power. *Stranton Iron Co.*, 16 Eq 559; *Moffat v. Farquhar*, 7 Ch. D. 591. B

(d) Nor can a transfer of fully paid up shares be rejected because the transferee is a bankrupt, and the shares will pass to the trustee in bankruptcy. *Sutton v. English and Colonial Produce Co.*, (1902) 2 Ch. 502. C

N.B.—In the absence of special provisions, the transferor is only bound to find a transferee who is legally competent to take the shares. *Lumsden’s case*, 4 Ch. 81, 84. D

1.—“The shares....of the Company”—(Continued).

(3) Transfer by directors.

- (a) A director is generally as competent as any other member to transfer his shares. The fact that a share-holder is also a director would not make him a trustee for the general body of share-holders so as to incapacitate him from transferring his shares to the prejudice of his *cestuis que trust*. *Gilbert's case*, 5 Ch. 559; *South London Fish Market, Co.*, 39 Ch. D. 324; *Cawley & Co.*, 42 Ch. D. 209; *Jessop's case*, 2 De. G. & J. 683; *Libri's case*, 30 L. T. (1857) 185. E

N.B.—But a director cannot transfer his qualification shares without giving up the directorship. (*Ibid.*) F

- (b) Where the articles provide for a surrender of shares by share-holders, a director may, like any other share-holder, surrender his shares. *Snell's case*, 5 Ch. 22. G

N.B.—But non-observance of the formalities will be strictly construed against him. *E. P. Brown*, 19 Beav. 97; *E. P. Henderson*, *ibid.* 107; *Eyre's case*, 31 Beav. 177. H

N.B.—He will not, however, be deemed to have knowledge of all that is entered in the company's books. *Hallmark's case*, 9 Ch. D. 329; *Denham & Co.*, 25 Ch. D. 752; *E. P. Cammel*, 1894, 1 Ch. 528; 534; 1894, 2 Ch. 392.

(4) Restrictions on the right of transfer.

- (a) The power of transfer conferred by this section may be regulated or restricted by the regulations of the company.
- (b) A provision in the articles for a compulsory transfer of shares to particular persons at a particular price is not obnoxious to the rule against perpetuities, nor is it void as being repugnant to absolute ownership. *Borland v. Steel Brothers*, (1901) 1 Ch. 279. J
- (c) A provision that, if a member becomes a bankrupt, his shares shall be sold to particular persons at a certain price, which is fixed for all members alike, is valid and is not obnoxious to the Bankruptcy law. (*Ibid.*) K

(5) Discretionary power of directors to approve or reject transfers.

- (a) Where the articles give the directors a discretionary power to approve a transfer or decline to register a transfer, the power is of a fiduciary nature and must be exercised in good faith in the interest of the company. It must not be exercised corruptly, fraudulently, arbitrarily, capriciously, wantonly, or for a collateral purpose. The directors must fairly consider the question of the transferee's fitness at a Board Meeting. *Per Chitty, J.*, in *Re Bell Brothers, Ltd., ex-parte Hodgson*, 7 Times Law Reps. 689, followed in 22 A. 410. See, also, *Bennet's case*, 5 D. M. & G. 284; 23 B. 685; 16 B. 80; *Poole v. Middleton*, 29 Beav. 646, 651; *Slee v. International Bank*, 17 L. T. 425; *London, Birmingham, etc., Bank*, 34 Beav. 332; 12 L. T. 45; *Robinson v. Chartered Bank*, 1 Eq. 32; *E. P. Penny*, 8 Ch. 446; 452. L
- (b) The power cannot be exercised until the question of each transfer together with the names of the transferors and the transferee is before the directors and they have an opportunity of considering each case. 23 B. 685. M

1.—“The shares....of the Company”—(Continued).

- (c) If it appears that the directors have *bona fide* considered the matter, the Courts will not compel them to disclose their reasons. 22 A. 410. **N**
- (d) In the absence of evidence to the contrary the Court will presume that they have acted *bona fide* and reasonably. *E.P. Penney*, 8 Ch. 446; *Reg v. Liverpool Railway Co.* 16 Jur. 949. *Coulport China Co.*, (1895) 2 Ch. 404; *Hannan's King Co.*, 14 Times L.R. 314. **O**
- (e) But, if they disclose their reasons, or if evidence is produced as to their reasons, the Court must consider them “in order to ascertain whether the directors have proceeded on a right or wrong principle.” 22 A. 410. See, also, 16 B. 80. **P**
- (f) It is an abuse of the power of directors to object to register a transfer on any ground not applying, personally to the transferee. *Per Mellish L.J.* in *Ex-parte Penney* (1872) L.R. 8 Ch. 446. See, also, *Moffat v. Farquhar* (1877), L.R. 7 Ch. D. 591; 16 B. 80; 22 A. 410. **Q**
- (g) Thus, it is not a legitimate reason that “the transferor's object was to increase the voting power in respect of his shares by splitting them up among his nominees.” (*Ibid.*) **R**
- (h) Nor is it a legitimate reason that the transferee's name is Smith and is not Bell. (*Ibid.*) **S**
- (i) Where the directors refused to register a transfer because the transferees refused to pledge themselves not to approve of a certain change in the mode of remunerating the company's agents, which the directors desired to effect, *held*, the objection was not personal to the transferee and the directors were bound to register the transfer. 16 B. 80; following *Moffat v. Farquhar*, L.R. 7 Ch. D. 591. **T**
- (j) The same principles apply whether the power of refusal is absolute or is limited to particular grounds. *Coal Port China Co.*, 1895, 2 Ch. 404. See, also, *Hannan's King Co.*, 14 Times L.R. 314. **U**
- (k) A clause giving the directors a discretionary power of rejection is intended for the protection of share-holders, and in construing such clause it must be borne in mind that, apart from such a clause, the right of transfer is unlimited. *Nicol's case*, 3 De. G. & J. 387, 488. **Y**
- (l) An action for damages lies against a company, if the directors improperly refuse to register a transfer. *Ottos Gopji Diamond Mines* (1893), 1 Ch. 618. See, also, *Shepherd's case*, 2 Eq. 564; 2 Ch. 16. **W**
- (m) In spite of a discretionary power conferred on the directors to approve or reject transfers, they cannot refuse to register a shareholder who has purchased shares in execution of a decree. 1 Ind. Jur. N.S. 258; *Burke O.C.* 395. **X**
- (n) In approving of a transfer, the directors are required to exercise the same amount of discretion as in rejecting a transfer, and must act in the interest of the Company. See 23 B. 685. **Y**
- (o) Where the directors passed a resolution on 18th October, “that up to the time of the next ordinary general meeting the board approve of all transfers of shares made by D.S. & R.K., two of the share-holders, or either of them, and will transfer the shares standing in their name to the transferees without claiming any lien or raising any objection,” *held*, the resolution was *ultra vires* and not binding on the company. (*Ibid.*) **Z**

1.—“The shares...of the Company”—(Continued).

- (p) Where a company has a lien over the shares of members indebted to it, the directors should refuse to register a transfer of shares subject to the lien till the debt is paid as, otherwise, the Company would lose its security. *Bank of Africa v. Salisbry Gold Co.*, (1892), App. Cas. 281. A

- (q) Where the regulations provide that transfers shall be executed both by the transferor and the transferee, directors may refuse to register a transfer executed by the transferor alone.

- (r) Even in the absence of such a provision, the directors may refuse to register a transfer not executed by the transferee where the practice of the company has been to require execution by the transferee. *Marino's case* (1867), 2 Ch. App. 596. B

- (s) If the directors having the power of rejecting a transfer have been imposed upon and consequently have been induced to accept a transfer, the transfer can subsequently be set aside and the name of the transferor restored to the list of contributories. *Payne's case* (1869), 9 Eq. 223; *Ex parte Kintrea* (1870), 5 Ch. 95. C

(6) Immunity of directors acting with due diligence.

Directors who act to the best of their judgment and approve a transfer would not be liable for any loss that the company may sustain in consequence of the transferee being a man of straw. *Faure Electric Accumulator Co.*, (1889) 40 Ch. B. 141. D

N.B.—A director having a discretion to approve or reject a transfer can approve of a transfer to himself. *Bush's case*, 6 Ch. 246, 262=L.R. 6 H.L. 37, 68. E

(7) Duty of transferor to transferee on non-acceptance of transfer.

If a transfer is not accepted and the transferor's name is on the register, the transferor becomes a trustee for the transferee and is bound to collect and pay the dividends to him as they accrue. *Stevenson v. Wilson*, (1907), S.C. 445 (Court of Session). F

(8) Notice of rejection.

Where a Company refuses to register a transfer, it is not bound to give notice of such refusal, to the transferor. *Gustard's case*, 8 Eq. 438. See, also, *Shipman's case*, 5 Eq. 219. G

N.B.—A receipt given by the Secretary of a Company, with whom a transfer is lodged for registration, does not amount to an undertaking that the Company will register the transfer.

(9) Approval of transfers—Form of.

Where no particular form is prescribed, an approval may be expressed in any form, and any facts from which it may fairly be presumed that consent must have been given would be sufficient. *Nicol's case*, 3 De. G. & J. 387, 434, 445. H

(10) General rules as to share-holder's right to transfer.

N.B.—Buckley has laid down the following rules gathered from the numerous decisions bearing on the subject. (See pp. 35 to 38, Buckley, 9th Ed.)

- (i) “A share-holder may, although the company is in difficulty, or even *in extremis*, effect a transfer of his shares, and such a transfer will be valid although made avowedly for the purpose of avoiding liability,

1.—“The shares....of the Company”—(Continued).

although made to a man of straw, although made for a nominal consideration, although a valuable consideration be expressed but be not in fact paid, or even although the consideration be in fact paid to, and not by, the transferee, provided the transaction be *bona fide* an absolute out and out disposal of the property without any trust or reservation for the benefit of the transferor.”

- (ii) “But if the transaction be colourable and fictitious, and the transfer be merely nominal, and there be any trust or reservation of benefit in favour of the transferor, the transaction is then invalid, and the transferor remains liable. For the purpose of determining whether the transaction is colourable, the Court will consider whether, as between the transferor and transferee, the equities were such that the transferee could, as between himself and the transferor, have repudiated the transfer.”
- (iii) “If, further, the transfer be not open and *bona fide*, but be made with colour indicating an attempt to escape liability in a manner tainted with fraud, or be made upon an opportunity fraudulently obtained, it cannot be supported.”
- (iv) In the case of Companies, whose directors have a discretion to reject transfers, “if the facts have been wilfully mis-stated to the directors, and if the facts were such that, in the opinion of the Court, the directors, if they had known them, would have, or ought to have, in the execution of their duty, refused to register the transfer, then, the transfer will be set aside, and the transferor rendered liable.” I & J

(11) Transfer in blank.

- (a) Where a vendor of shares signs a transfer, leaving a blank for the name of the transferee, the person to whom the document is delivered has an implied authority to fill the blank with his own name or the name of his nominee. *Ex parte Sargeant* (1874), 17 Eq. 273; see, also, *Walker v. Bartlett*, (1856) 18 C.B. 845; *France v. Clark*, (1884) 26 Ch. D. 257. K
- (b) The person whose name is inserted has a right to be registered as a shareholder. *Tahiti Cotton Co.*, *Ex parte Sargeant*, (1874) 17 Eq. 273. L
- (c) There is an implied contract that the transferor will do nothing to hinder the completion of the title of the person whose name is inserted as transferee. *Hooper v. Herts*, (1906), 1 Ch. 549. M

(12) Transfer by way of mortgage.

- (a) A mortgage of shares may be effected “by depositing with the mortgagee a transfer executed by the mortgagor, and the certificates of the shares. The transfer is commonly in blank as regards the name of the transferee and the date of execution.” Buckley, 9th Ed., p. 578. N
- (b) A person who holds a blank transfer by way of mortgage can fill in his own name, and get the transfer registered. Buckley, 9th Ed., pp. 578, 579. O
- (c) Or, he may transfer the security, and fill in the name of the transferee of the security and register the transfer in the purchaser's name. (*Ibid.*) P
- (d) But, he cannot mortgage the shares to secure a debt of his own and get the shares registered in the name of the mortgagee. *France v. Clark*, 22 Ch. D. 880; 26 Ch. D. 257. Q

I.—“*The shares.... of the Company*”—(Continued).

- (e) If a person holding a blank transfer as a mortgagee hands over the same in blank to another, to secure a debt of his own, and the latter fills it up with his name, he cannot get a better title than his transferor, by relying on the doctrine of *bona fide* purchaser for value without notice, for, the fact that the instrument is in blank is itself a sufficient notice that the transferor had no absolute title to the shares. See *France v. Clark*, 22 Ch. D. 830; 22 Ch. D. 257; *Fox v. Martin*, 64 L.J. (Ch.) 473; (1895) W.N. 86. R
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- (a) A contract for the sale of shares cannot be specifically enforced, if the directors having the power of rejection, refuse to assent to the transfer, unless the Court is able and is willing to compel their assent. *Birmingham v. Sheridan*, 33 Beav. 660. X
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- (iv) In the case of Companies, whose directors have a discretion to reject transfers, “if the facts have been wilfully mis-stated to the directors, and if the facts were such that, in the opinion of the Court, the directors, if they had known them, would have, or ought to have, in the execution of their duty, refused to register the transfer, then, the transfer will be set aside, and the transferor rendered liable.” I & J

(11) Transfer in blank.

- (a) Where a vendor of shares signs a transfer, leaving a blank for the name of the transferee, the person to whom the document is delivered has an implied authority to fill the blank with his own name or the name of his nominee. *Ex parte Sargeant* (1874), 17 Eq. 273; see, also, *Walker v. Bartlett*, (1856) 18 C.B. 845; *France v. Clark*, (1884) 26 Ch. D. 257. K
- (b) The person whose name is inserted has a right to be registered as a shareholder. *Tahiti Cotton Co.*, *Ex parte Sargeant*, (1874) 17 Eq. 273. L
- (c) There is an implied contract that the transferor will do nothing to hinder the completion of the title of the person whose name is inserted as transferee. *Hooper v. Herts*, (1906), 1 Ch. 549. M

(12) Transfer by way of mortgage.

- (a) A mortgage of shares may be effected “by depositing with the mortgagee a transfer executed by the mortgagor, and the certificates of the shares. The transfer is commonly in blank as regards the name of the transferee and the date of execution.” Buckley, 9th Ed., p. 578. N
- (b) A person who holds a blank transfer by way of mortgage can fill in his own name, and get the transfer registered. Buckley, 9th Ed., pp. 578, 579. O
- (c) Or, he may transfer the security, and fill in the name of the transferee of the security and register the transfer in the purchaser's name. (*Ibid.*) P
- (d) But, he cannot mortgage the shares to secure a debt of his own and get the shares registered in the name of the mortgagee. *France v. Clark*, 22 Ch. D. 880; 26 Ch. D. 257. Q

1.—“The shares....of the Company”—(Continued).

- (e) If a person holding a blank transfer as a mortgagee hands over the same in blank to another, to secure a debt of his own, and the latter fills it up with his name, he cannot get a better title than his transferor, by relying on the doctrine of *bona fide* purchaser for value without notice, for, the fact that the instrument is in blank is itself a sufficient notice that the transferor had no absolute title to the shares. See *France v. Clark*, 22 Ch. D. 830; 22 Ch. D. 257; *Fox v. Martin*, 64 L.J. (Ch.) 473; (1895) W.N. 96. R
- (f) But, if the mortgagee himself fills in the transfer, and gets the transfer registered, his transferee will get a good title to the shares, provided he is a *bona fide* purchaser for value without notice; the mortgagor will in such a case be estopped from denying the title of the purchaser. *Eastern v. London Joint Stock Bank* (1887), 34 Ch. D. 95; see, also, *London Joint Stock Bank v. Simmons*, (1892) A.C. 201; *Collins v. Hibernian Bank*, 31 L.R. Ir. 261; *Robinson v. Montgomery Brewery Co.*, (1896) 2 Ch. 841. S
- (g) He cannot, however, acquire a title to the shares, if he had notice that his transferor had only a limited interest in the shares. *Eastern v. London Joint Stock Bank*, (1887) 34 Ch. D. 95; *Sheffield v. London Joint Stock Bank*, 13 A.C. 333, as explained in *London Joint Stock Bank v. Simmons*, (1892) A.C. 201, 208. T

(13) Joint holding of shares.

Shares may be allotted to, and registered in, the names of two or more persons jointly. See Sch. I, Table A, Art. I, *infra*. U

(14) Liability of joint stock holders for calls.

The liability of the joint holders of a share for instalments and calls in respect of such share is only joint unless it is expressly provided that it is joint and several. *Evans and Cooper*, p. 26. Y

(15) Transfer by joint holders.

Shares that are registered in the names of several persons jointly, cannot be transferred by one of them. *Barton v. North Staffordshire Railway*, (1888), 38 Ch. D. 458. W

(16) Contract for transfer of shares—Specific performance of.

- (a) A contract for the sale of shares cannot be specifically enforced, if the directors having the power of rejection, refuse to assent to the transfer, unless the Court is able and is willing to compel their assent. *Birmingham v. Sheridan*, 33 Beav. 660. X
- (b) In such cases if the purchaser had entered into the contract in ignorance of the restriction on the right of transfer, he can sue the vendor for damages. *Poole v. Middleton*, 29 Beav. 646. Y
- (c) Where the directors have not the power of rejecting a transfer absolutely, but the articles require that the transfer should be “in such manner as a board—should approve,” the Court may decree specific performance. *Poole v. Middleton*, 29 Beav. 646. Z
- (d) If the transferor fails to comply with the rules of the Company for effecting a valid transfer, the transferee can, in a suit for specific performance, get an order requiring the transferor to comply with rules. *East Wheal Martha Mining Co.*, 33 Beav. 119, 121. A

i.—“The shares....of the Company”—(Continued).

(17) Irregularities in transfer—Effect of.

- (a) A transfer would not be set aside owing to irregularities and omissions, in unessential matters. *Letheby and Christopher, Lim.*, (1901) 1 Ch. 815; see, also, *Ex parte Contract Corporation*, 3 Ch. 105; *Royal Bank of India's case*, 7 Eq. 91; 4 Ch. 252; *Davies v. Bolton & Co.* (1894) 3 Ch. 678; *Weikersheim's case*, 8 Ch. 831, 837, 839. **B**
- (b) A transfer cannot, after a certain time, be impeached, where the formalities of transfer have been substantially observed, and the transferee has been accepted as a share-holder by the directors and by the general body of share-holders. *Bush's case*, 6 Ch. 246; *Murray v. Bush*, L.R. 6 H.L. 37; *Taurine Co.*, 25 Ch. D. 118; *Hugh's case*, 15 W.R. 476=15 L.T. 526. **C**
- (c) Thus, where the articles require transfers to be executed by both the transferor and transferee, a transfer executed by the transferor alone, would, where the Company has acted upon the transfer, and accepted the transferee as a member, after a certain time, become unimpeachable. *Taurine Co.*, 25 Ch. D. 118. See *Cunningham v. Glasgow Bank*, 4 A. C. 607. **D**
- (d) Even where the non-observance of form would have an invalidating effect, if the Company has adopted a course of dealing without complying with the prescribed form a transfer made in accordance with that usage cannot be impeached. *Shortridge v. Bosanquet*, 16 Beav. 84; *Bargate v. Shortridge*, 5 H. L. C. 297; *Strafford's Executor's case*, 1 D. M. & G. 576; *Frere's case*, (Alb. & Arb.) 15 Sol. J. 674. **E**

(18) Invalid transfer—Effect of.

- (a) Where a transfer of shares is invalid, the transferee gets no title to the shares, and the transferor's liability in respect of those shares remains unaffected. See *Addison's case*, 5 Ch. 294, 297; *Bell's case*, 4 A. C. 563. **F**
- (b) “A man who executes a transfer of shares remains liable unless and until there is on the list a transferee who is legally liable to the Company.” *Per Giffard, L. J.*, in *Symon's case*, 5 Ch. 298, 300; see, also, *Curtis case*, 6 Eq. 455, 459; *England's case*, (1884) W.N. 174; *Addison's case*, 5 Ch. 294, 297; *Bell's case*, 4 A. C. 563; *Spackman v. Evans*, L.R. 3 H.L. 171, 238. **G**
- (c) Every one who has at any time become a share-holder continues to be a share-holder until he has ceased to belong to the Company by forfeiture or transfer of shares or in some other authorized manner. See *Spackman v. Evans*, L.R. 3 H. L. 171, 238; see, also, *Addison's case*, 5 Ch. 294, 297; *Bell's case*, 4 A.C. 563. **H**
- N.B.**—Sometimes the liability of a member may come to an end without any one else becoming liable in his place, e.g., a participating policy holder of an insurance company. *Brown's case*, 18 Ch. D. 639. **I**

(19) Examples of invalid transfers.

- (a) A transfer to a person without his consent is invalid. *Heritage's case*, 9 Eq. 5; *Cartmell's case*, 9 Ch. 691. **J**
- (b) A transfer to an infant is void, for an infant is incapable of entering into a contract. See 30 C. 539=7 C.W.N. 441 (P.C.); also 26 A. 342. **K**

1.—“The shares.... of the Company”—(Continued).

N.B.—But, under the English Law, a transfer to an infant is not void but only voidable, and the infant may, on attaining majority, repudiate or confirm the transfer if no winding up order has been made. *Lumsden's case*, 4 Ch. 81; see, also, *Gooch's case*, 14 Eq. 454=8 Ch. 266. **L**

(c) A transfer made under a mistake may be invalid. *Anderson's case*, 8 Eq. 509. **M**

N.B.—“As the validity of a transfer depends upon the agreement to transfer and to accept the shares purporting to be transferred, it follows that if the transfer be filled up with shares which the transferor did not agree to transfer, or with shares that the transferee did not agree to accept, or is a forgery, such transfer is a nullity.” Buckley, 9th Ed., p. 581. **N**

N.B.—Where a transfer has been passed by mistake, and the transferee's name is entered in the register, the mistake may be corrected and the register amended. *Anderson's case*, (1868), 8 Eq. 509. **O**

(d) A transfer which amounts to a surrender is invalid except under circumstances in which a surrender would be valid. *Morgan's case*, 1 De. G. & Sm. 750=1 Mac. & G. 225=1 H. & T. 320; *Bellerby v. Rowland & Co.*, (1902) 2 Ch. 14; *Lowe's case*, 1 D. & M. & G. 421; *Bennett's case*, 5 D.M. & G. 234; *Daniell's case*, 22 Beav. 43; *Munt's case*, 22 Beav. 55. **P**

(e) A transfer by a member to the Company itself or to a nominee of the Company is invalid, for, a Company is prohibited from purchasing its own shares. S. 249, *infra*. **Q**

N.B.—By purchasing its own shares a Company reduces its capital in a manner not authorized by the Act. *Evans & Cooper*, p. 26. **R**

(f) Where a transfer is made to a nominee of the Company, the transferee may be personally liable to the Company in addition to the transferor in respect of the shares. *Gree v. Somervail*, (1879) 4 A.C. 648. **S**

(20) Forged transfers.

(a) A forged transfer is invalid and gives the transferee no rights, though the Company gives him a certificate for the shares purported to have been transferred. *Simm v. Anglo American Telegraph Co.*, (1879) 5 Q.B.D. 188. **T**

(b) But, if any person not having notice of the forgery, purchases the shares on the faith of the statements in the certificates, the Company is bound to make good the losses he may have sustained. *Bahia and San Francisco Railway Co.*, (1868) L.R. 3 Q.B. 584; *Hart v. Frontino Co.*, (1870) L.R. 5 Ex. 111; *Balkis Consolidated Co. v. Tomkinson*, (1893) App. Ca. 396; *Ottos Kopje Diamond Mines*, (1893) 1 Ch. 617; see, also, *Sheffield Corporation v. Barclay*, (1903) 2 K.B. 580. **U**

(c) The person claiming relief must show that he has suffered loss by being misled by the certificate. *Simm v. Anglo-American Telegraph Co.*, (1879) 5 Q.B.D. 211. **Y**

(d) The transferee himself can obtain the same relief if he has been “put to rest” by the certificate, and is unable to claim re-payment of the purchase money from the vendor at a time when he might have successfully done so. *Dixon v. Kennaway*, (1900) 1 Ch. 833. **W**

I.—“The shares....of the Company”—(Continued).

- (e) But the burden of proving that he cannot now recover lies on the transferee. (*Dixon v. Kennaway*, (1900) 1 Ch. 833). X
- (f) If the Company sets up the defence that the transferee could not have recovered the money from the transferor at the date of the transfer the onus of proving this lies on the Company. (*Ibid.*) Y
- (g) If a Company acting upon a forged transfer enters the name of the transferee in the register, it may be compelled to remove the name of the transferee and to enter the name of the transferor in the register and to pay him also the amount of any dividends that might have been declared in the meantime. *Barton v. North Stafford Railway Co.*, (1888) 38 Ch. D. 458; *Barton v. London and North Western Railway Co.*, (1890), 24 Q.B.D. 77; *Re Bahia Railway*, (1867) L.R. 3 Q.B. 584. Z
- (h) But the Company is not required to pay any compensation to the supposed purchaser. *Gore-Brown & Jordan*, 30th Ed., p. 159. A
- N.B.**—In England, by the Forged Transfers Acts of 1891 and 1892, Companies are authorized to pay compensation for losses arising from forged transfers. But the Acts are not compulsory and a Company may adopt them or not as it pleases.
- (i) A person who lodges a transfer with a Company is under an implied obligation to indemnify the Company if the document turns out a forgery. See *Sheffield Corporation v. Barclay*, (1905) App. Cas. 392. B
- (j) If the Company discovers the forgery before the transferee has acquired a title by estoppel, it can recover the certificate and remove the transferee's name from the register. *Per Romer, L.J. (Ibid.)* C

(21) Transfer by delivery.

Though the Act does not expressly forbid transfers of shares by delivery, yet, such transfer would be clearly contrary to the spirit of the Act. As the Act authorizes the issue of share warrants, transferable by delivery, and that only in the case of fully paid-up shares, shares transferable by delivery would seem to be illegal. See *Buckley*, 9th Ed., p. 561. D

(22) Liability of members on amalgamation.

Where, upon the amalgamation of a Company with another Company, a member of the first Company takes shares in the second Company, he does not cease to be liable in respect of the shares in the first Company. *E. P. Nash*, 16 L.T. 689. See, also, *Part's Case*, 10 Eq. 622; *Woodhams v. Anglo-Australian Co.*, 2 D J. & S. 162. E

N.B.—As to the effect of a transfer of shares allotted as fully paid-up without a registered contract as required by S. 28, *supra*, see notes under that section. F

(23) Transfer by legal representative of a deceased member.

A transfer may in certain cases be made by persons who are not members. Thus, a transfer by a legal representative of a deceased member, though not a member himself, is as valid as a transfer by a member himself. See S. 46, *infra*. G

I.—“The shares....of the Company”—(Continued).

(24) Transfer in Companies registered under the Joint Stock Companies Act.

A Company registered under the Joint Stock Companies Acts (XIX of 1857 and VII of 1860) or either of them may cause its shares to be transferred in manner before in use, or in such other manner as the Company may direct. See S. 223, *infra*. H

(25) Effect of transfer of shares.

(a) “Where a member transfers his shares he transfers all his rights and obligations as a share-holder from the date of transfer. He does not transfer his rights to dividends or bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls.” *Per Lindley, J. in Taylor, Phillips and Richard’s case*, (1897) 1 Ch. 305. I

(b) But, in the absence of any special provision to the contrary, the transferee is entitled to any dividend that is *in gremio*, as it were, at the transfer, though it is payable for a period anterior to that date. *Black v. Homersham*, 4 Ex. D. 24. J

(c) Thus, where a sale was made on the 1st of August, and a dividend was declared on the 28th August, for a period ending with 30th June, this dividend was held to belong to the purchaser. (*Ibid.*) K

(26) Transferee’s title, when complete.

(a) The transferee does not acquire full title to the shares until the transfer is registered. *Societe Generale v. Walker*, 11 A.C. 20, 28; *Nanney v. Morgan*, 35 Ch. D. 598. L

(b) So, if A transfers his shares to B, and before the transfer is registered, A transfers the same shares to C, who gets his transfer registered, C will acquire title to the shares. *Nanney v. Morgan*, 37 Ch. D. 346, 354. M

(c) But, if B had been a purchaser for value he could restrain the registration of the transfer to C. (*Ibid.*) N

(27) Liability for calls before registration of transfer.

So long as the transfer is unregistered, the transferor is liable to pay calls. But there is an implied contract for the transferor to indemnify him. *Loring v. Davis*, (1896) 32 Ch. D. 625. O

(28) Rectification of register.

(a) If the name of the transferee, is, through the default of the Company, not entered in the register of members, the Court may rectify the register and relieve the transferor of his liability. See S. 58, *infra*. P

(b) Similarly, if a transfer is fraudulent and the transferee’s name has been entered in the register, the Court can order the rectification of the register so as to make the transferor liable. See S. 58, *infra*. Q

(c) If a transfer duly made, is owing to “unnecessary delay” on the part of the Company not registered, and the Company is wound up, the transferor will be relieved by the Court of his liability, and the transferee’s name will be substituted for the name of the transferor in the list of contributories. See *Nation’s case*, 3 Eq. 77. See, also, S. 58, *infra*. R

N.B.—Where there are no circumstances to show why a transferee should not be accepted, it will be presumed that the directors would have accepted the transfer. *Evans v. Wood*, 5 Eq. 9; see, also, *Paine v. Hutchinson*, 3 Ch. 388, 393. R-1

1.—“The shares....of the Company”—(Concluded).

(29) Stamp duty payable on transfers.

- (a) For stamp duty payable on transfers, see notes under S. 29, *supra*. S
- (b) The directors may refuse to register a transfer that is not properly stamped. T
Maynard v. Cons. Kent Collieries, (1903) 2 K.B. 121.
- (c) To ascertain whether a transfer is duly stamped or not the directors may go beyond what appears to be the consideration on the face of the instrument. *Maynard v. Cons. Kent Collieries*, (1903) 2 K.B. 121. U

2.—“Each share....appropriate number.”

(1) Absence of and errors in denoting numbers—Effect of.

- (a) The title of a share-holder to the shares is not affected by the absence of denoting numbers. *Portal v. Emmens*, 1 C.P.D. 201, 211; *affirmed* in 1 C.P. Div. 664. Y
- (b) Where the agreement for transfer is proved, a mere error in the denoting of numbers of shares is immaterial. *Ind's case*, 7 Ch. 485. See, also, *Pinket v. Wright*, 2 Hare 120; *Letheby and Christopher, Lim.*, (1904) 1 Ch. 815; *Bishop's case*, 7 Ch. 296 (n); *E.P. Contract Corporation, Lim.*, 1 Ch. 815. W

45. The subscribers of the memorandum of association of any

Definition of Company under this Act shall be deemed to have “member.” agreed to become members of the Company whose memorandum they have subscribed ¹, and upon the registration of the Company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed with a Company under this Act to become a member of such Company, and whose name is entered on the register of members, shall be deemed to be a member of the Company ².

(Notes).
General.

(1) Corresponding English Law.

This section corresponds to S. 24 of the English Companies (Consolidation) Act, 1908. The words “under this Act” which follow the words “The subscribers.....of any Company” in the Indian Act, as also the words “with a Company under this Act” which follow the words “and every other person who has agreed” are not found in the English Act. W-1

(2) Scope and effect of the section.

- (a) The section defines the status of a subscriber of the memorandum of association in a different way to the position of other persons. A subscriber is liable whether or not his name is entered in the register of members; but with regard to other persons, the section makes it a condition precedent to membership that their names should be placed on the register. See *Tufnell's case*, 29 Ch. D. 421; *Nanney v. Morgan*, 35 Ch. D. 598=37 Ch. D. 346. See, also, 12 B. 311 (316). X
- (b) The section creates two distinct obligations; one which has force from the moment of subscription, the other which comes into force on registration. 12 B. 311 (316). Y

General—(Continued).

(3) Object of the section.

- (a) The chief—is to create confidence in the minds of the public on the subscribers of the memorandum becoming members of the Company. *Tufnell's case*, 29 Ch. D. 421; *Migottis' case*, 4 Equity 238. Z
- (b) The persons signing the memorandum are required by the Legislature to do so as an earnest that there are certain persons personally liable to pay money to the Company. *Per Lord Romilly in Drummond's case*, 4 Ch. App. 772 (776-n). A
- (c) The agreement which the law implies from the signing of the memorandum was intended for the protection of creditors and shareholders. 12 B. 311 (316). B

N.B.—The subscribers are the guarantors of the *bona fides* of the Company and are a body with a status before the registration. 12 B. 311 (315, 316). C

(4) Members may be of different classes.

- (a) The members of a Company may be of different classes. Thus in a mutual assurance society there may be members who hold shares and who are primarily liable for the Company's debts, and participating policy-holders not holding shares, and only secondarily liable or not at all liable. See *Wintsons's case*, 12 Ch. D. 239; *Great Britain Mutual Society*, 16 Ch. Div. 246; cited in Buckley, p. 47. D
- (b) Similarly, in a Life and Fire Insurance Society, there may be members holding life shares and liable only on life policies, and members holding fire shares and liable only on fire policies. See *Bath's case*, 8 Ch. Div. 334; cited in Buckley, 9th Ed., p. 47. E

(5) Liability without membership.

"A man may become a contributory to a Company by his acts, although he has not made himself legally a member of it." *Per Lord St. Leonards in Spackman v. Evans*, L.R., 3 H.L. 171, 208. F

(6) Joint holding of shares.

- (a) A share may be registered in the names of two or more persons jointly. *Evans & Cooper*, p. 26. G
- (b) Unless it is provided that the joint holders of a share shall be jointly and severally liable for the payment of all instalments and dividends, their liability is joint only. *Evans & Cooper*, p. 26. H

N.B.—In the absence of anything to the contrary, it will be presumed that all share-holders have equal rights as regards capital and dividends. *Re Bridgewater Navigation Co.*, (1889) 14 A.C. 525. H-1

(7) Corporation, as a shareholder.

A corporation may, if permitted by its memorandum and articles of association, become a member, but not otherwise. *Bath's case*, (1878) 8 Ch. D. 334; *Barned's Banking Co.*, *ex parte Contract Corporation*, (1868) 3 Ch. 105. See, also, 3 B.H.C. (O.C.J.) 185. I

General—(Concluded).

(8) Partnership, as a share-holder.

- (a) Partners in a firm may be joint members in a Company, and if the constitution of the firm so allows, a partner may accept shares so as to bind the firm. *Weikersheim's case*, 8 Ch. 831; *Neimann v. Neimann*, 43 Ch. Div. 198. J
- (b) An allotment of shares to a firm would make every partner of the firm liable as member. *Glory Paper Mills*, *Dunster's case*, (1894) 3 Ch. 473. K

1.—“The subscribers....they have subscribed.”

(1) Memorandum of association.

- (a) The memorandum of association of which this section is conversant, is the registered memorandum. 5 B. 425 (434), following 1 B. at p. 328; *Cf. New Brunswick Ry. Co. v. Boore*, 3 H.N. 249. L
- (b) A person is not liable as the subscriber of the memorandum, if the document which he has signed is not the document which was registered as the memorandum or even a true copy of it. 12 B. 647; see, also, 1 B. 320; 5 B. 425. M
- (c) Thus where a person signed a document which was represented to him to be the memorandum of association of a projected Company, but the document was not registered as memorandum, but another document, differing from it in material particulars was registered as the memorandum, *held*, the subscriber was not a share-holder in the Company registered, as the effect of the second document was to alter his position from what it would have been if the document subscribed by him had been registered. 1 B. 320; see, also, 5 B. 425. N

(2) Signing a copy of memorandum, whether amounts to signing the memorandum.

- (a) In 5 B. 425 (434) the question was raised whether the signing of a true copy of the registered memorandum was equivalent to signing the registered memorandum so as to make the subscriber of the copy a member of the company under the earlier part of the section. The point was not decided, as the document in that case was not even a true copy of the memorandum. N-1
- (b) A person who signed a copy of the memorandum, and who by many subsequent acts identified himself with and treated himself as a member of the Company was, on all these grounds, and not merely by reason of his signing the copy, held estopped from denying the membership. *Palmer's case*, Ir. Rep. 2 Eq. 573. O
- (c) In 13 B. 1, it was *held* that a person, who signed a copy of the memorandum of association, before the registration of the original memorandum, did not, by reason of his signature, agree to become a member within the meaning of the section. 13 B. 1. P
- (d) Similarly a person who signs a duplicate copy of the memorandum after its registration is not a subscriber of the memorandum within the meaning of the section, and does not become a member by reason of his signature. The signature does not create the positive agreement which the law has made the necessary consequence of the real memorandum before registration. 14 B. 196; see, also, 13 B. 1. Q

1.—“The subscribers....they have subscribed”—(Continued).

- (e) The signature of the duplicate after the registration of the original is however equivalent to an offer to the Company to take shares, and if the offer is accepted, the person signing is a person who has agreed to become a member within the meaning of this section, and is liable for calls if his name is entered on the register. (*Ibid.*) R
- (f) But a signature of a copy of the Memorandum before its registration does not amount even to a proposal to take shares, for at the time of signing the copy the Company is not in existence. 13 B. 415. S

(3) Signature of Memorandum by Agent.

- (a) The Memorandum may be signed by an agent, acting under an oral authority and the execution is valid whether the agent simply writes the principal's name, or adds words showing that it is signed by an attorney. *Whitley Partners, Limited*, (1886), 32 Ch. D. 337. T
- (b) But signature by an unauthorized agent is ineffectual. *Land Shipping Colliery Co.*, 18 L.T. 786. U
- (c) Though the principal is bound by the signature of an agent, still, if a person subscribes on behalf of another, the subscriber himself will be the proper person to be placed on the register. *Mason's Hall Co.*, *Noble's case*, 16 W.R. 1135. Y

(4) Improper attestation of signature, effect of.

When the Memorandum has been registered, a subscriber cannot escape liability as a member on the ground that his signature was not properly attested. The transaction may be irregular but is not void. 17 B. 472 (475). W

(5) Liability of subscribers of Memorandum.

- (a) When a person has signed the Memorandum for a certain number of shares, he is bound absolutely to take those shares. The statutory liability, the creation of the agreement, commences with the signature of the Memorandum and is not held in suspense until the registration of the Memorandum. The section does not leave to the subscriber a *locus penitentie* up to the time of registration. 12 B. 311; see, also, *Drummond's case*, 4 Ch. App. 772; *Tyddyn Slate Co.*, (1869), 20 L.T. 105; *Pell's case*, (1870), 5 Ch. 11. X
- (b) A subscriber cannot escape liability by the fact that no shares have been allotted to him. So long as there are shares left for allotment, he is liable for calls. He is relieved of his liability only when the whole of the shares are allotted to other persons, so that none is left in respect of which he can be registered. 13 B. 57; see, also, *London & Prov. Coal Co.*, 5 Ch. D. 525; *Sidney's case*, 19 Eq. 228; *Hall's case*, 5 Ch. 707; *Evan's case*, 2 Ch. 427; *Tufnell's case*, (1885), 29 Ch. D. 421; *Levick's case*, (1870), 40 L.J. Ch. 180=28 L.J. 338. Y
- (c) “A man who signs the Memorandum of association agrees to become a share-holder, and so long as there are shares that can be allotted to him he must fulfil that obligation,” *Per Jessel, M.R.*, *Drummond's case*, 7 Ch. App. 780, followed in 13 B. 57 (80). Z
- (d) The directors cannot relieve a subscriber of his liability to take the shares subscribed for, nor can they substitute another person for him. *Evan's case*, 2 Ch. 427. A

1.—“The subscribers....they have subscribed”—(Continued).

- (e) A subscriber cannot obtain a rescission of his contract to take shares, on the ground that he was induced to subscribe for the shares through the misrepresentation of a promoter, for (1) the misrepresentation could not be attributed to the Company as it had not come into existence at the time of his subscription, and (2) the contract effected by signature followed by registration of the Memorandum is a contract to the benefit of which the other subscribers and all other members are entitled. *Lord Lurgan's case*, (1902), 1 Ch. 707; see *Buckley*, 9th Ed., p. 49. **B**
- (f) Nor can a subscriber escape liability by mere lapse of time. *Levick's case*, 40 L.J. Ch. 180=23 L.T. 838; *Sidney's case*, 13 Eq. 228; *Tooth's case*, 1868, W.N. 270=19 L.T. 599. **C**
- (g) With regard to matters not required to be stated in the Memorandum, the subscriber is not irrevocably bound. *Gilman's case*, 31 Ch. D. 420; see, also, *Duke's case*, 1 Ch.D. 620. **D**
- (h) Thus the subscriber for a particular class of shares may take shares of a different class. (*Ibid.*) **E**
- (i) A subscriber for a certain number of shares, may apply for and have allotted to him a larger number than those subscribed for. *Dale's case*, 1 Ch. D. 620. **F**

(6) Subscriber bound to take shares from the Company.

The subscriber is under an obligation to take the shares subscribed for, from the Company, and the obligation is not discharged if he takes them from some one else. *Migotti's case*, 4 Eq. 238; *Benett's case*, 15 W.R. 1058=16 L.T. 475; *Tooth's case* 19 L.T. 599=(1868) W.N. 270; *Dent's case*, 15 Eq. 407=8 Ch. 768; *Fraser's case*, 28 L.T. 158=21 W.R. 642=42 L.J. (Ch.) 358; *Forbes and Judd's case*, 5 Ch. 270. **G**

(7) Subscriber bound to pay to the Company for shares taken.

- (a) The subscriber is required to pay to the Company for the shares taken in money or money's worth. 13 B. 57. See, also, *Forbes and Judd's case*, 5 Ch. 270; *Fraser's case*, 28 L.T. 158=21 W.R. 642=42 L.J. (Ch.) 358. **H**
- (b) This requirement as to payment to the Company is not complied with, if he takes as the nominee of another person, shares on which payment have been made by that other. *Forbes and Judd's case*, 5 Ch. 270; *Fraser's case*, 28 L.T. 158=21 W.R. 642=42 L.J. Ch. 358. **I**
- (c) Nor does the present of paid-up shares to subscriber satisfy the obligation. 13 B. 57. **J**

N.B.—If the Company issues a certificate in respect of such paid-up share, it is not thereby estopped from enforcing the subscriber's liability so long as the certificate has not passed to a *bona fide* transferee for value. (*Ibid.*) **K**

- (d) The provisions of S. 28, *supra*, requiring that members should pay for their shares in cash in the absence of a registered contract, apply to subscribers of Memorandum as well as to other members. See *Jervis & Co. Limited*, (1899) 1 Ch. 193; also *Ebenezer Timmins and Sons*, (1902), 1 Ch. 238. **L**

N.B.—As to what amounts to payments in cash, and the circumstances in which payment otherwise than in cash is allowed, see S. 28, *supra*, and notes thereunder.

1.—“The subscribers....they have subscribed” —(Concluded).

(8) Subscriber should take one share at least.

(a) No subscriber of the Memorandum shall take less than one share, and each subscriber shall write opposite to his name the number of shares he takes. See S. 8, *supra*. M

(b) If a subscriber omits to write opposite to his name the number of shares he takes, he would, probably, having regard to S. 8 (2) be deemed to have taken one share. See Buckley, 9th Ed., p. 48. N

(9) Subscriber's liability, how extinguished.

(a) A subscriber can get rid of his liability by taking the shares, and then making a legal transfer of them. *Sidney's case*, 13 Eq. 228; *Magotti's case*, 4 Eq. 238. See, also, *in re Argate Coal and Canal Co., Limited*, *Ex parte Watson*, Times Rep. Vol. II, p. 213=54 L.T.N.S. p. 238. O

(b) His liability will also cease, if he makes a valid surrender of his shares to directors empowered to accept a surrender. *Snell's case*, 5 Ch. 22. P

N.B.—But the liability will not cease if there is no valid surrender, and the act of the directors purporting to accept a surrender is *ultra vires* the Company and the directors. *Hall's case*, 5 Ch. 707. P1

(c) Again a subscriber will be relieved of his liability if all the shares are allotted to other persons, and none is left in respect of which he can be registered. *Dunster's case*, 1894, 3 Ch. 473; *Mackeley's case*, 1 Ch. D. 247; *Kipling v. Todd*, 3 C.P. Div. 350; *Tufnell's case*, 29 Ch. D. 421. Q

N.B.—The liability thus extinguished, will not revive if by subsequent forfeiture of shares or increase of capital the Company becomes possessed of shares, out of which an allotment can be made to the subscriber. *Mankley's case*, 1 Ch. D. 247; *Kipling v. Todd*, 3 C.P. Div. 350. Q1

(d) In order that a subscriber may escape liability on the ground of allotment of all the shares to others, it is necessary that the allotment should be final or complete. Otherwise the liability will not be extinguished; for in such a case it cannot be said that there are no shares available for allotment to the subscriber. *Evan's case*, L.R. 2 Ch. 427, followed in 13 B. 57 (60). R

(e) A subscriber may also be relieved of his liability by an alteration in the articles of association, made after signature and before registration. *Felgate's case*, 2 D.J. & S. 456; see, also, *Peel's case*, 2 Ch. 674. S

2.—“Every other person....member of the Company.

(1) Entry on the register, when essential for membership.

As regards persons other than subscribers of the memorandum, the section makes it a condition precedent to membership that their names should be entered on the register. See *Tufnell's case*, 29 Ch. Div. 421.T

(2) Register not conclusive evidence of membership.

But a person who has agreed to become a member cannot escape liability, merely because his name is not on the register; for the Court can rectify the register under S. 58, *infra*, when the Company is a going concern, and under S. 147, *infra*, when it is in liquidation. Names

2.—“Every other person....member of the Company”—(Continued).

which ought not to be on the register may then be taken off, and names which ought to be there may be put in. See *Rees River Mining Co. v. Smith*, L.R. 4 H.L. 64, 77, 80; *Winstone's case*, 12 Ch. D. 239, 249; *Noke's case*, 16 W.R. 413, 1135=37 L.J. (Ch.) 473, 624; see, also, 9 W.R. 539. U

(3) Register of Members—Probative force of.

- (1) “If a proper register is kept, that register is *prima facie* evidence that a person whose name is on it, is a share-holder.”
- (2) “If in addition it be proved that such person became by subscribing to the prescribed sum or otherwise entitled to a share in the Company, the evidence that he is the share-holder is conclusive.”
- (3) “If there be no register, or if the register is so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a share-holder.” *Per Lindley, J* in *Porter v. Emmons*, 1 C. P.D. 201, *affirmed* in 1 C.P.D. 664. Y

N.B.—These rules said of the Companies Clauses Act, are, it is conceived, equally true of this Act. See Buckley, 9th Ed., p. 47. Y1

(4) Company should be in existence at the time of contract.

- (a) An agreement to take shares can be entered into only with a Company in existence on the date of the agreement. 13 B. 415 (422). See, also, 5 B. 425; 12 B. 647. W
- (b) As a Company under the Act comes into existence only on registration, an agreement entered into with the promoters of a Company before its registration is not an agreement under the section. 12 B. 647. See, also, 2 P.R. 1905. X
- (c) Such an agreement cannot be ratified by the Company after it comes into existence. (*Ibid.*) Y

N.B.—A promoter of a Company is not its agent before its formation, *Sidney and Wigpool Iron Ore Company v. Bird*, L.R. 23 Ch. Div. 85 at p. 91. Y1

- (d) A person who signs the prospectus of a projected Company, and whose name is entered in a list of intending share-holders, accompanying the prospectus, for a certain number of shares does not thereby enter into an agreement to take those shares. 9 W.R. 539. Z

N.B.—Ss. 23 (h) and 27 (e) of the Specific Relief Act were not intended to apply to contracts to take shares, but only to contracts for the working purposes of a Company. These sections only crystallize the English law as to cases where the Company has taken the benefit of a contract, but refuses to carry it into full effect. 13 B. 415 (423). Z1

(5) Agreement for membership.

- (a) “Whether a person other than a subscriber of the memorandum or a director, has agreed to become a member, is mixed question of fact and law.” Buckley, 9th, Ed., p. 56. A
- (b) Where there is a doubt as to whether a person is a share-holder or not, the directors may, by way of compromise, relieve him of his liability. *Butt's case*, 8 Ch. D. 334. B

2.—“Every other person...member of the Company”—(Continued).

- (c) An Agreement to take shares may be entered into with an agent of the Company. *Exp. Audain*, 42 Ch. D. 1; *Exp. Badman and Bosanquet*, 45 Ch. D. 16. **C**
- (d) The agent of a Company is not personally liable when he contracts on behalf of the Company. 3 P.R. 1867. **D**
- (6) **Contract for shares—Offer and acceptance.**
A contract to take shares is, like other contracts, based on offer and acceptance, and is governed by the provisions of Ss. 3 to 12 of the Contract Act dealing with acceptance, communication and revocation of proposals and contracts generally. See *Russell & Bayley*, p. 53. **E**
- (7) **What constitutes offer and acceptance.**
(a) When an application for shares is made by one of the public, and an allotment is made by the Company, the application constitutes the offer, and the allotment is the acceptance of the offer. See *Bukley*, 9th Ed., p. 56. **F**
(b) But if the applicant is not one of the public, but is a person who is entitled to an allotment of a certain number of shares if he chooses to take them, the application by that person concludes the contract. In such cases the offer proceeds from the Company, and the applicant accepts it. Such cases frequently arise upon amalgamation or re-construction. *Tucker's case*, 41 L.J. (Ch.) 157; 20 W.R. 88; *Adam's case*, 13 Eq. 474; see, also, *Buckley*, 9th Ed. p. 57. **G**
- (8) **Contract based on application and allotment—Essentials of.**
To constitute a contract to take shares found on an application and allotment there must be (1) an application by the intending share-holder, (2) an allotment (3) communication of the allotment to the applicant. *Scottish Petroleum Co.*, 23 Ch. D. 418 (430). See, also, *Nicol's case* 29 Ch. D. 421, 426; *Pellat's case*, 2 Ch. 527. **H**
- (9) **Acceptance to be in accordance with regulations.**
An acceptance, to bind a person as member, must be in accordance with regulations. 12 B. 647. **I**
- (10) **Conduct amounting to tacit acceptance.**
Where a person was induced to take shares in a Company through the fraud of a stranger, and, having become aware of the fraud took no steps to inform the Company that he did not accept the shares, but in a letter described the shares as his own, *held* that this amounted to a tacit acceptance of the offer, and affirmation of the contract in spite of the fraud; and that the ground did not affect the Company as the person who made the representation was not an agent of the Company. 127 P.R. 1889. **J**
- (11) **Allotment of shares for goods sold to Company.**
If a person who sells goods to a Company is paid for in shares, and the vendor's name is entered in the register, he becomes a member, and is liable as a contributory, though the payment in shares is part of an agreement which becomes in other respects incapable of being carried out. *Gore and Durrant's case*, 2 Eq. 349; see *Buckley*, p. 61. **K**
- N.B.**—But if the Company having the option to pay in shares does not exercise the option before the winding up, the vendor cannot be compelled to accept payment in shares, in the company which is no longer a going concern. *Sharon's claim*, (1866), W.N. 231; see *Buckley*, p. 61. **K-1**

2.—“Every other person....member of the Company”—(Continued).

(12) Payment by set off.

“Shares taken in payment of a debt due may be paid by set-off of the amount of the debt.” *Manchester Finance Corporation, Re Matlock Old Bath Co.*, 29 L.T. 411=22 W.R. 41. See Buckley, p. 61. L

N.B.—As to the liability in respect of shares issued as paid-up without a registered contract, and as the effect of a transfer by the allottee of such shares, see notes under S. 28, *supra*.

(13) Power of acceptance—Delegation of, by directors.

Directors having a power of allotment cannot, unless expressly authorized to do so by the regulations, delegate their power to a Committee. *Howard's case*, 1 Ch. 567; *Harris' case*, 7 Ch. 587. M

(14) Acceptance of conditional offers.

(a) If the offer is made subject to a condition precedent which is not complied with, or if the offer is conditional, and the acceptance is unconditional, there is no contract. Buckley, 9th Ed., p. 59; see, also, *Wood's case*, 3 De. G. & J 88; *Coleman's case*, 1 D.J. & S. 495; 8 L.T. 292; *Howard's case*, 1 Ch. 561; *E.P. Harwood and others*, 20 L.T. 736; *Simpson's case*, 9 Eq. 91; *Simpson v. Heaton's steel Co.*, 19 W.R. 148, 614; 23 L.T. 510; 25 L.T. 179. *Roger's case*, 3 Ch. 633, *Wood's case*, 15 Eq. 236. N

(b) But if the applicant waives the condition, subject to which the offer has been made and accepts the allotment conditionally, he will be bound. *Ranvin v. Hop and Malt Exchange Co.*, 20 L.T. 207; *Wheatcraft's case*, 29 L.T. 324. O

(c) If, however, the offer is not subject to a condition precedent, but the applicant agrees to become a member *in presenti*, with a collateral agreement or subject to a condition subsequent, the applicant cannot, after allotment, notice and registration, escape liability on the ground of non-fulfilment of the collateral agreement or condition. *Elkington's case*, 2 Ch. 511; *Fisher's case*, 31 Ch. Div. 120; *Bridger's case*, 9 Eq. 74; 5 Ch. 305; *Thomson's case*, 4 D.J. & S. 749; *E.P. Burton*, 16 Jun. 967. P

(d) Whether a condition is precedent or collateral will depend upon the circumstances of each case, and the intention of the parties. See *Elkington's case*, 2 Ch. 511, *Pellat's case*, 2 Ch. 527; *Pordage v. Cole*, 1 Wms. Saund. 550 and note thereto. Q

(e) In cases of amalgamation, where a share-holder of the selling Company applies for shares in the purchasing Company and the proposed amalgamation falls through, the question arises whether the application is subject to a condition precedent that has not been fulfilled. Buckley, 9th Ed., p. 64. R

(f) If the share-holder enters into no personal negotiation, and only acts through his Company, and does nothing but consents to and acts on the amalgamation, then unless the amalgamation is eventually completed, he is not bound. *Per Mellish, L.J. in Dongan's case*, 8 Ch. 540, 546; see, also, *Alabaster's case*, 7 Eq. 273; *Cf. Somerville's case*, 6 Ch. 266.

2.—“Every other person....member of the Company”—(Continued).

- (g) But if without acting through his Company he makes a personal application to the purchasing Company, and the shares are registered in his name, he is bound. *Hare's* case, 4 Ch. 503; *Challis's* case, 6 Ch. 266; *Dongan's* case, 8 Ch. 540; 546. T
- (h) If however, the applicant distinctly refers to the transfer of business, the application shall be deemed only a conditional one, and, if the amalgamation falls through, the applicant will not be bound. *London and Exchange Bank*, 16 L.T. 840. U
- (i) If shares in the purchasing Company are allotted on terms different from those on which the application was made, the applicant is not bound. *Wynne's* case, 8 Ch. 1002; *Beck's* case, 9 Ch. 392. Y
- (j) Where the application is made direct to the purchasing Company, if the shares are allotted on terms different from those on which the application was made, the applicant is not bound. *Wynne's* case, 8 Ch. 1002; see *Buckley*, 9th Ed., p. 64. W

N.B.—In such a case, the fact that the applicant asks for the certificate of his shares would not amount to an acceptance of the fresh terms so as to bind the applicant by those terms. *Beck's* case, 9 Ch. 392. W-1

N.B.—Where a Company is subject to a statutory provision that no shares shall be issued to or vest in a person until a certain amount shall have been paid up, the payment of the amount is not a condition precedent to the liability upon the shares, but only to the rights of the property in and transfer of them. *East Gloucester shire Railway Co. v. Bartholomew*, L.R. 3 Ex. 15; *Purdey's* case, 16 W.R. 660; *Mc Even v. West London Wharves Co.*, 6 Ch. 655. W-2

N.B.—But, if in such a case the transfer is registered, “it may operate as a new contract between the transferor, the transferee and the Company.” See *Buckley*, 9th Ed., p. 62. W-3

- (k) An agreement to take shares based on a condition that is *ultra vires* the directors, is not binding either on the Company or the allottee. See *Coleman's* case, 1 D. J. & S. 495; *Bunn's* case, 2 D.F. & J. 275, 295, 299; *Pellett's* case 2 Ch. 527. X

(15) Acceptance with a variation—Effect of.

- (a) If an application for shares is accepted with a new term or condition introduced into the acceptance there is no contract. *Addinell's* case, 1 Eq. 225; *Jackson Turquand*, L.R. 4 H.L. 305; *Beck's* case, 9 Ch. 392; *Howard's* case, 1 Ch. 561; *Pentelow's* case, 4 Ch. 178; *Harris's* case, 7 Ch. 587. Y
- (b) But, if the applicant accepts the condition, he will be bound. *Barret's* case, 2 De G. & S. 30; see also *Harris's* case, 7 Ch. 587. Z

(16) Conditional allotment.

- (a) If a conditional allotment is made, the allottee is not a member until the condition has been complied with. *Spitzel v. Chinese Corp.*, 43 S.J. 350. A

2.—“Every other person . . . member of the Company”—(Continued).

- (b) Thus where scrip certificates for shares are issued, entitling the holders thereof, on fulfilment of certain conditions, e.g., payment of instalments and registration, to shares, there will, if such conditions are conditions precedent, be no completed contract until the fulfilment of the conditions. The contract will be merely a contract entitling the scrip holder at some future time to apply for or receive an allotment of shares. *Ormerod's case*, 5 Eq. 110. *Mc Ilraith v. Dublin Trunk Railway Co.*, 7 Ch. 184; cited in *Buckley*, 9th Ed., p. 61. **B**

(17) Invalid allotments.—

- (a) An invalid allotment will not render the allottee a contributory, unless he is estopped by his conduct. *Stace & Wroth's case*, 4 Ch. 682. See, also, *Campbell's case*, 9 Ch. 1; *Croone's case*, 16 Eq. 417; *Miller's Dale &c. Co.* 31 C.D. 211; *Briton Medical, etc., etc.*, Ass. W.N. (1889) p. 129. **C**
- (b) An allotment at a meeting of which due notice was not sent to all the directors was held invalid. *Homer District Consolidated Gold Mines*, 39 C.D. 546; *E.P. Ross*, 59 L.T. 291, 813; *Re Portuguese Consolidated Copper Mines, Ltd*, 42 C.D. 160, cited in *Emden's winding up*, 8th Ed., at p. 216. **D**
- (c) But such an allotment would be rendered valid, if ratified at a subsequent duly constituted meeting. *Badman's & Bosanquet's case*, 45 C.D. 16; *Cf. Bolton Partners v. Lambert*, 41 C.D. 295. **E**
- (d) A director who had taken shares in the capital of a Company, issued in pursuance of an irregular resolution was held liable as a contributory. *In re Miller's Dale, &c., Co.*, 31 Ch. D. 211. **E-1**

N. B.—“The share-holders could waive an irregularity in respect of a provision in their own regulations, introduced for their own protection, and could acquiesce in the execution of shares despite the irregularity.” *Buckley*, 9th Ed., p. 164. **F**

- (e) An allotment of a smaller number of shares than those applied for, will not bind the allottee. *Robert's case*, 1 Drew 204; *Exp. Barber*, 20 L.J. Ch. 146. **G**
- (f) An allotment to a person other than the applicant does not bind. *Mollorie's case*, 2 Ch. 281. **H**
- (g) A person is not liable as a member in respect of shares registered in his name without his consent or application by him. *Chapman & Baker's case*, 3 Eq. 361 (365); *Ship's case*, 2 De G. J. & S. 544; *Goldie v. Torrance*, 10 Ct. of Sessions Case (Sc) 174. See, also, 9 W.R. 539. **I**
- (h) In England it has been held that an unstamped letter of allotment will bind the allottee, though after the receipt of the unstamped letter and before the subsequent receipt of a stamped allotment, the allottee repudiates. *Whitely Partners*, 28 W.R. 241=42 L.T. 11. **J**

Quære:—Whether an unstamped allotment would in India conclude the contract. See *Russell and Bayley*, p. 56.

N.B.—An alteration of the articles after application for shares, and before allotment, does not invalidate the allotment. *Lyon's case*, 35 Beav. 646. **K**

2.—“Every other person....member of the Company”—(Continued).

(18) Contract not concluded without communication of allotment.

(a) Where a member of the public applies for shares in a Company, the contract is not concluded until an allotment is made by the Company and the allotment is communicated to the applicant. *Pellatt's case*, 2 Ch. 527; *Hebb's case*, 4 Eq. 9; *Gunn's case*, 3 Ch. 40; *Sahlgreen and Carrall's case*, 3 Ch. 323; *Fletcher's case*, 37 L.J. (Ch.) 49=16 W.R. 75=17 L.T. 136; *Tothill's case*, 1 Ch. 85; *Ward's case*, 10 Eq. 659, 662; see, also, 13 B. 1; 7 A.W.N. 57. **L**

(b) “Where an individual applies for shares in a Company, there being no obligation to let him have any, there must be a response by the Company, otherwise there is no contract.” *Per Cairns, L.J. in Pellat's case*; see, also, 13 B. 1. **M**

N.B.—The decision in *Bloxam's case* 33 Beav. 529=4 D.J. and S. 447, where an allottee who had received no notice of allotment was held liable, can only be supported on the ground of special circumstances. See *Buckley*, 9th Ed., 90 p. 53 F. n (m). See *Pellat's case*, 2 Ch. 535; *Quinn's case*, 3 Ch. 44.

(19) Communication of allotment—Modes.

Communication of the allotment may be made orally, or in writing or by conduct. *Gunn's case*, 3 Ch. 40. See, also, E.P. Fox, 11 W.R. 577=2 N.R. 1=8 L.T. 223; *Land Shipping Colliery Co.*, 18 L.T. 786. **N**

N.B.—But a mere entry on the register, after allotment, does not amount to a communication, for it is not the applicant's duty to search the register. See *Buckley*, 9th Ed., p. 57.

(20) Notice to agent of applicant—Effect.

(a) Notice of allotment may be given to an agent of the applicant, authorized for receiving shares for him. *G.H. Levita's case*, 5 Ch. 489; *Davies' case*, 41 L.J. 659; *Fraser's case*, 19 W.R. 844; 24 L.T. 746; *De Rozaz' case*, 20 L.T. 348; 21 L.T. 10; *Wallis's case*, 4 Ch. 325 note. *Robinson's case*, 4 Ch. 322; *Barret's case*, 4 D.J. & S. 416. **O**

(b) An allottee who has authorized his agent to receive shares for him is bound by the acts of his agent (q). *Cockney's case*, 26 Beav. 6=3 De. G. & J. 170; *Geenre's case* 3 Ch. 44. **P**

(c) But a letter of acceptance posted neither to the applicant nor to his authorized agent is ineffectual. *Hebbs' case*, 4 Eq. 9; see, also, *Ward's case*, 10 Eq. 659; *Wallis's case*, 4 Ch. 325 n; *Robinson's case*, 4 Ch. 330. **Q**

(21) Burden of proving notice of allotment.

The onus of proving notice of allotment is on the Company. *Reidpatte's case*, 11 Eq. 86; *De Rozaz case*, 20 L.T. 348; 21 L.T. 10. **R**

(22) Acceptance communicated through post.

(a) If the offer is made by a letter with a request express or implied, that the acceptance may be communicated through post, the contract is concluded as soon as the letter of acceptance is posted whether it reaches the applicant or not. *Household Fire Insurance Co. v. Grant*, 4 Ex. Div. 216; *Townsend's case*, 13 Eq. 148. **S**

2.—“Every other person....member of the Company”—(Continued).

(b) Even where the offer is not made by post, an acceptance communicated through post may conclude the contract and bind the applicant. *Henthorn v. Fraser*, 1892. 2 Ch. 27, 33; see, also, *Burner v. Moore*, 1904, 1 Ch. 305. T

(c) Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted. Per Lord Herschell in *Henthorn v. Fraser*, (1892) 2 Ch. 27, 33. See, also, *Brumer v. Moore* (1904), 1 Ch. 305. See, also, Buckley, 9th Ed., p. 58. U

(d) A person who applies for shares in the usual form impliedly authorizes the Company to communicate the acceptance by post. (*Ibid*) ; see, also, *Harris' case*, 7 Ch. 587; *Hebb's case*, 4 Eq. 9; *Wall's case*, 15 Eq. 18. V

(e) “The logical proposition lying at the root of the cases must be that A making the offer has impliedly contracted with B that so soon as B posts the acceptance the contract shall be complete, in other words, that the acceptance made by B in a defined way as distinguished from the acceptance communicated to A shall be effectual. Buckley, 9th Ed., p. 58. W

(23) Direct notice of allotment not necessary.

(a) To bind the allottee, it is not necessary that he should have direct notice of allotment. It is enough if he comes to know the fact of allotment in any way or if he stands in a position as that he must have known, or acts in a manner inconsistent with ignorance. *Bird's case*, 4 D.G. & S. 200; *A. Levita's case*, 3 Ch. 36; *Fletcher's case*, 37 L.J. (Ch.) 49 = 16 W.R. 75; *Plimsoll's case*, 21 L.T. 653; *E. P. Cammel* (1894) 1 Ch. 528; *Crawley's case*, 4 Ch. 322; *E. P. Briggs*, 1 Eq. 488; *Davis' case*, 26 L.T. 650 = 41 L.J. (Ch.) 659; *Richards v. Home Insurance Association*, L.R. 6 C.P. 59; *Ritson's case*, 4 Ch. Div. 744; *Gorriessen's case*, 8 Ch. 507. *Wheatcroft's case*, 29 L.T. 324; *Land Shipping Colliery Co.*, 18 L.T. 786; *Empson's case*, 9 Eq. 597. See, also, Buckley, 9th Ed., p. 57. X

(b) Thus, a director of a Company who applied for additional shares in his own name was held bound by an allotment without direct notice. *Bird's case*. See, also, *A. Levita's case*, 3 Ch. 36; *Fletcher's case*, 37 L.J. (Ch.) 49 = 16 W.R. 75. Y

(c) So also was an allottee who, after the allotment, executed a transfer. *Crawley's case*, 4 Ch. 322. Z

(d) Also an allotment to an agent for a Company where it is part of the arrangement that the agent shall take shares. *Davies' case*, 26 L.T. 650 = 41 L.J. (Ch.) 659. See Buckley, p. 51. A

(e) In *Wheatcroft's case*, 29 L.T. 324, an auditor who neither applied nor received notice of allotment was held bound. B

N.B.—Buckley doubts whether this case can stand with *Hallmark's case*, 9 Ch. Div. 329. See Buckley, 9th Ed., p. 57.

N.B.—An auditor who swore that he did not look into the Company's books or do anything more than help in making up the minute book was held not liable. *Land Shipping Colliery Co.*, 18 L.T. 796; *Empson's case*, 9 Eq. 597. See, also, Buckley, 9th Ed., p. 57.

2.—“Every other person....member of the Company”—(Continued).

(24) Application for shares—Revocation of.

- (a) A proposal may be revoked at any time before the communication of its acceptance is complete against the proposer but not afterwards. S. 5, Contract Act (IX of 1872). C
- (b) The communication of an acceptance is complete, as against the proposer, when it is put in course of transmission to him, so as to be out of the power of the acceptor. See S. 4. (*Ibid.*) D
- (c) The applicant for shares may therefore prevent the conclusion of the contract by withdrawing at any time before the allotment, or even after the allotment, before the notice of it is communicated to him or while the contract is still *in fieri*. See *Ramsgate Hotel Co. v. Montefiore*, L.R. 1 Ex. 109; *Hebbs'* case, 4 Eq. 9; *Gledhill's* case, 7 Jur. (N.S.) 981; 3 D. F. & J. 713; *Mile's* case, 4 D.J. & S. 471; *Cf. Ritso's* case, 4 Ch. D. 774; *Gold Co. of Southern India*, (1880) W.N. 198; *Pentelow's* case, 4 Ch. 178. E

(25) Modes of revocation.

- (a) A proposal is revoked,
 - (1) by the communication of notice of revocation by the proposer to the other party;
 - (2) by the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, by the lapse of a reasonable time without communication of the acceptance;
 - (3) by the failure of the acceptor to fulfil a condition precedent to acceptance;
 - (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance; S. 6, Ind. Contract Act (IX of 1872). F

N.B.—As to revocation of offer by non-acceptance within a reasonable time, see *Carmichael's* case, 17 Sim. 163, 166; *E.P. Baily*, 5 Eq. 428; 3 Ch. 592; *Gun's* case, 3 Ch. 40; *Ritso's* case, 4 Ch. D. 774; *Ramsgate Hotel Co. v. Montefiore*, *Ramsgate Hotel Co. v. Goldsmid*, L.R., 1 Ex. 109; *Mathew's* case, 3 De. G. & Sm. 234.

N.B.—If the applicant fixes a period within which acceptance should be made, the offer expires on the expiration of the period; such an offer however does not bind the offeror to keep it open for the prescribed period. It only amounts to an intimation to the offeree that he cannot accept after the prescribed period. See *Shepherd & Cunningham v. Indian Contract Act*, notes to S. 6 (2).

- (b) An application for shares cannot be accepted after the Company has gone into liquidation, so as to make the applicant a contributory. 13 B. 1 (7). G
- (c) The withdrawal of the offer may be oral. *Natal Investment Co., Wilson's* case, 20 L.T. 962; *Treman's* case, 1894, 3 Ch. 272. H
- (d) An offer may also be revoked by an act inconsistent with the continuance of the offer, done to the knowledge of the other party. *Dickinson v. Dodds*, 2 Ch. D. 463. I

2.—“Every other person....member of the Company”—(Continued).

(26) Revocation of offer, when complete.

(a) The revocation of an offer is not complete until it is brought to the knowledge of the person to whom the offer is made. The person making the offer must be presumed to be continuously making the offer, until the fact of withdrawal is brought to the knowledge of the offeree. *Henthorn v. Fraser*, 1892, 2 Ch. 27. J

(b) Hence though the offer may be withdrawn before the letter of acceptance is posted, still if the offeree has no knowledge of the withdrawal till after the acceptance is posted, the withdrawal is ineffectual. See *Byrne v. Van Tienhoven*, 5 C.P.D. 344; *Stevenson v. Mc Lean*, 5 Q.B.D. 346; *Henthorn v. Fraser*, (1892), 2 Ch. 27. K

N.B.—Under such circumstances, the burden of proving that the letter of withdrawal was received after the letter of acceptance was posted, lies on the Company. *E.P. Jones*, 1900, 1 Ch. 220. L

(c) Where an offer for shares is accepted on behalf of the Company by an agent not authorized to do so, and the acceptance is ratified by the Company, there is a binding contract, and any withdrawal of the offer between the date of the acceptance of the offer, and the date of ratification is inoperative, for the ratification of the acceptance relates back to the date of acceptance. *Bolton Partners v. Lambert*, 41 Ch. D. 295. M

(d) Similarly, where an allotment that was invalid because not made at a proper Board meeting, was subsequently confirmed at a proper Board meeting, the contract was held to be concluded in spite of a withdrawal of the offer by the applicant between the first and the second meetings. *Portuguese Copper Mines, Badman's and Bosanquet's cases*, 45 Ch. D. 16, following *Bolton Palmers v. Lambert*, 41 Ch. D. 295. N

(27) Offer by telegram—Place of.

An offer made by telegram must be treated as having been made at the place to which the telegram is directed, and if a reply by telegram is desired, the reply must be treated as having been made at the office from which it is despatched. *Crown v. O'Connor*, 20 Q.B.D. 640, 642. O

(28) Qualification shares of Directors.

(a) Unless the regulations of a Company require its directors to hold a specified share qualification, a person appointed as a director need not hold any share in the Company. The Act does not make it obligatory on a director to hold shares. See *Russell & Bayley*, p. 57. P

(b) Thus the directors of Companies governed by table A, *infra*, need not hold any qualification shares. But a director of a Company adopting table A. of Sch. I, of the English Companies Act (1908), should hold at least one share for his qualification. See Art. 70, table A, Sch. I of the Consolidation Act (1908). Q

N.B.—By Art. 53 (table A), *infra*, until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors.

2.—“Every other person....member of the Company”—(Continued).

N.B.—Ss. 72 and 73 of the English Companies (Consolidation) Act, 1908, have introduced changes in the English law on the subject of share qualification of directors. These sections aim at fixing directors with their qualification shares. The earlier cases on the subject have, therefore, under the present English law, become less important. The Indian Companies Act does not contain provisions corresponding to Ss. 72 and 73 of the English Act, and it is submitted that the authority of the earlier English cases on the subject is not diminished for the decision of cases under the Indian Act.

(c) Where the articles require that the qualification of a director shall be the holding of a certain number of shares, a person who accepts the post of a director and acts as such, shall be deemed to have entered into a contract with the Company that he will serve on the terms contained in the articles. See *Isaac's case*, 1892, 2 Ch. 158, 164, 166, 167. See, also, *Bread Supply Association*, 1898 W.N. 14; 62 L.J. (Ch.) 376; 68 L.T. 434; *Salton v. New Beeston Co.*, (1899) 1 Ch. 775. **R**

N.B.—Though the articles do not constitute an agreement between a director and the Company, still they are evidence of the terms of the contract between him and the Company. *Salisbury Jones's case*, 1894, Ch. 3, p. 363; *Molineaux v. London Insurance Co.*, 1902, 2 K.B. 589, 596.

(d) Under the English law a person is incapable of being appointed director of a public Company by the articles, and shall not be named as a director of the Company in any prospectus or in any statement in lieu of prospectus filed by or on behalf of the Company, unless before the registration of the articles or publication of the prospectus, or the filing of the statement in lieu of prospectus as the case may be, he has by himself or by his agent authorized in writing, either signed the memorandum for a number of shares not less than his qualification (if any) or signed and filed with the registrar a contract in writing to take from the Company and pay for his qualification shares (if any). See S. 72, English Companies (Consolidation) Act, 1908. **S**

(29) Qualification shares need not be purchased from the Company.

A person who accepts the office of director does not thereby undertake to take the qualification shares from the Company; he may get them in open market or from a friend within a reasonable time after the acceptance of the office. 13 B. 1. See, also, *Karuth's case*, 20 Eq. 506, 509; *Hamley's case*, 5 Ch. Div. 705, 707; *Brown's case*, 9 Ch. 102; *Miller's case*, 3 Ch. D. 665. **T**

N.B.—But under the English law a person appointed as a director by the articles, or named as a director in any prospectus, or in a statement filed in lieu of prospectus, shall acquire the qualification shares (if any) from the Company. See S. 72 (I) (ii) of the Companies (Consolidation) Act, 1908.

(30) Director need not pay for qualification shares.

It is not necessary, that qualification shares should be paid for by the qualifying director. 13 B. 1 (6). **U**

2.—“Every other person....member of the Company”—(Continued).

(31) Period within which qualification should be acquired.

- (a) There is an implied contract that a director will acquire the qualification within the period, if any, prescribed by the articles in this behalf, or if no such period is prescribed within a reasonable time after his appointment, and before he acts as director. See *Brown's case*, 9 Ch. 102; *Forbe's case*, 8 Ch. 768, 774; *Carling's case*, 1 Ch. Div. 115. Y
- (b) “Where the qualification is not indispensable to election, the director has a reasonable time for acquiring the qualification either from the Company, or anybody else, but he must acquire it before he acts. Although he may abstain from acting for a reasonable time, still if he abstains from acting for a very long time, he is liable; he is equally liable if he acts—the time ceases to run when he acts,” Per *Jessel M. R.* in *Miller's case*, 3 Ch. D. p. 665. W

N.B.—But in the case of a Company that has not commenced business, the reasonable time within which a director may acquire his qualification will continue to run. See *Hewitt's case* (1884) 25 Ch. D. 283; *re Issac Co., Hutchinson's case* (1895) 1 Ch. at p. 235; *Lord Inchquin's case*, 3 Ch. 28, 35.

- (c) Mere acceptance of office will not create liability. *Karuth's case*, 20 Eq. 506; *Wheal Buller Consols*, 38 Ch. D. 42; *Onslow's case*, W.N. (1887) p. 79; *Ex. P. Cammell*, (1894) 2 Ch. 392. X
- (d) Under the English law every director who is by the regulations of a Company required to hold a specified share qualification, and who is not already qualified, should obtain his qualification, within two months after his appointment or such shorter time as may be fixed by the regulations. See The English Companies (Consolidation) Act, 1908, S. 73 (1). Y

(32) Director acting without qualification, effect of.

- (a) If a director continues to act without acquiring the qualification, then, on the expiration of the period within which the qualification is to be acquired, it will be inferred that he has made an offer to the Company for an allotment of as many shares as may be necessary to make up his qualification. *Salisbury Jones's case*, (1894) 3 Ch. 356; *Onslow's case* (1888), 57 L.J. Ch. 338. Z
- (b) He shall not be deemed to have made any such offer, if he has resigned his post before the expiration of such period. (*Ibid.*) A
- (c) If he has already got some shares his offer will be limited to as many shares as may be necessary to complete the qualification. *Duke's case*, (1875) 1 Ch. D. 620; *Miller's case*, (1876) 3 Ch. D. 661, 667. B
- (d) But until the offer is accepted by the Company and the acceptance is communicated to him, he will not be liable as a member in respect of those shares. *Tothill's case*, (1865) 1 Ch. 85; *Ex parte Cammell* (1894) 2 Ch. 302; *Wheal Buller Consols* (1888) 38 Ch. D. 42. *Hutchinson's case*, 1895, 1 Ch. 226. C
- (e) If the name of the director is placed on the register of members, this would constitute a sufficient notice to him that his offer has been accepted. *Ex parte Cammell* (1894) 2 Ch. 262, D

2.—“Every other person....member of the Company”—(Continued).

- (f) “If in the ordinary course of the business of the Company he is registered in their books as a share-holder, the agreement which the man enters into by becoming a director to take the qualification is a sufficient authority for the registration, and therefore he is a duly registered share-holder whether he knew of the registration or not. *Brown's case*, 9 Ch. 102, as explained by Jessel M.R. in *Miller's case*, 3 Ch. D. 661, 665. E
- (g) But in order that a director may be held liable in respect of shares registered in his name without his actual knowledge, it must be shown that he was acting as a director at a time when he could not so act without possessing the qualification. *Ex parte Cammell* (1894) 2 Ch. 262. F
- (h) But in the case of a Company whose regulations do not provide for share qualification, a person shall not, by the mere fact that he acts as director be deemed to have notice of an allotment in consequence of his name being entered in the register of members. A director will not be presumed to have knowledge of all the entries in the Company's books. See *Hallmark's case*, Ch. Div. 329. G
- (i) A director who acts without qualification is not guilty of misfeasance within the meaning of S. 214, *infra*. *Coventry and Dixon's case*, 14 Ch. Div. 660. H
- (j) Under the English law if a director does not obtain the qualification within the prescribed period, or ceases, at any time after the expiration of such period, to hold his qualification, his directorship is vacated, and he is incapable of being re-appointed as director until he has obtained his qualification. (*Ibid.*) S. 78 (2). I
- (k) Moreover an unqualified person who continues to act as a director after the expiration of the period fixed for acquiring the qualification, shall under the English law, be liable to a fine of £5 for every day between the expiration of the said period and the last day on which it is proved that he acted as a director. (*Ibid.*) S. 73 (3). J

(83) Liability of director without actual allotment.

- (a) If the articles contain a provision to the effect that a director who has not otherwise acquired his qualification within a specified period “shall be deemed to have agreed to take the shares from the Company and the same shall forthwith be allotted to him accordingly,” the director becomes liable as a member in respect of those shares immediately on the expiration of the period, whether or not the Company makes any allotment, and whether or not his name is entered in the register of members; and if the Company goes into liquidation after the prescribed period, his name can be placed on the list of contributors. *Isaac's case* (1892) 2 Ch. 158; *Salton v. New Beeston Cycle Co.*, (1899) 1 Ch. 775. K
- (b) His liability is not affected by the fact that having accepted the office of the director, he did not act as such. *Hercynia Copper Co.* (1894) 2 Ch. 403; *Carling's case*, (1876) 1 Ch. D. 115. L
- (c) But even in such a case, if he resigns within the period within which he is to acquire the qualification, he would not be liable. *Salisbury Jones's case* (1894) 3 Ch. 356. M

2.—“Every other person . . . member of the Company”—(Continued).

(34) Appointment of directors without qualification, when void.

(a) If, under the articles, the acquisition of the qualification shares, is a condition precedent to the appointment of a person as a director, the appointment of a person who has not got the qualification is a nullity, and he shall not, by the fact of his acting as director, be deemed to have offered to take the requisite shares from the Company. See *Hanley's case*, (1877) 5 Ch. D. 705; *Barber's case*, (1877) 5 Ch. D. 963; *Jenner's case*, (1878) 7 Ch. D. 132; *Coventry and Dixon's case*, (1880) 14 Ch. D. 660; *Wheal Buller Consols* (1888) 33 Ch. D. 45. N

(b) A person who is disqualified at the time of his election from being a director, cannot be held liable in respect of qualification shares. *Barber's case*, 5 Ch. D. 963. O

“Thus if the articles provide that no person shall be “eligible” as a director, unless he holds so many shares, the holding of the requisite number of shares is a condition precedent to election and the appointment as director, of a person who has not acquired the qualification is void. *Barton's case*, (1877) 5 Ch. D. 963; *Jenner's case*, (1878) 7 Ch. D. 132. O-1

N.B.—But such a provision is applicable only to directors *elect*ed, and not to directors appointed by the articles, who do not require election. *Stock's case*, 4 D.J. & S. 426; *Forbe's case*, 8 Ch. 768; *Watford's case*, 20 L.T. 74.

(35) Liability in respect of qualification shares.

(a) If shares have been allotted to a director for his qualification after he has become liable to accept them from the Company, his liability in respect of those shares will not cease by his accepting the same number of shares from third parties. *Ilfracombe Railway Co. v. Nash*, 22 L. T. 209; *Lord Inchiquin's case*, (1891) 3 Ch. 28; *Salton v. New Beeston Cycle Co.*, (1899) 1 Ch. 775. P

(b) The acceptance of the office of director “is most material in determining whether a man shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the Company, have actually been placed in his name, and which were needful for his qualification.” See *Brown's case*, 9 Ch. 102, 107; see, also, *Molineaux v. London Insurance Co.*, (1902) 2 K.B. 589. Q

(c) A director cannot by an invalid surrender of his qualification shares be relieved of his liability as a member, though shares bearing the same number are subsequently allotted by the Company to others, provided there are sufficient shares unissued to provide for the number allotted to the Director. *Lord Walls Court's case* (1899) 7 Mans. 235. R

(36) Director holding qualification shares “in his own right,”—Meaning of.

(a) If the articles require that a director should hold the qualification shares “in his own right,” this only means that he should not hold them in a representative capacity, e.g., as an executor of a deceased shareholder or a trustee in bankruptcy. But this does not prevent him from holding them as a trustee or mortgagee. The Company is

2.—“Every other person....member of the Company”—(Continued).

not required to go behind the register to ascertain whether the registered owner is the beneficial owner. *Per Jessel M.R. in Pulbrook v. Richmond Mining Co.* 9 Ch. D. 610; see, also, *Cooper v. Griffin*, 1892 1 Q.B. 740. (But see the opinion of Lindley L.J. *contra* in *Pulbrook v. Richmond*.) S

N.B.—The holder “must be a person who holds in such a way that the Company can safely deal with him in respect of his shares, whatever his interest may be in the shares.” *Sutton v. English Colonial Produce Co.*, (1902) 2 Ch. 502.

- (b) If the Company knows the holder to be a bankrupt, or if it has actually entered in the register that the holder is an executor or liquidator, the shares will not form a qualification. (*Ibid.*) See, also, *Boschoek v. Fuks*, (1906) 1 Ch. 148. T

(3) Effect of altering qualification clause in the articles.

- (a) If the articles are altered, and a clause is introduced to the effect that the “future qualification” of a director shall be the holding of so many shares, this does not apply to existing directors. *Lord Claude Hamilton's case*, 8 Ch. 548. U
- (b) But it is possible to alter the articles in such a way as to require qualification from even existing directors. See *Currie's case*, 3 D.J.S. 367; *Esparto Trading Co.*, 12 Ch. D. 191. Y

(38) Allotment of more shares than those necessary for qualification.

- (a) A director need not take the qualification shares in addition to those which he has acquired independently. *Miller's case*, 3 Ch. D. 661, 667; *Duke's case*, 1 Ch. D. 620. W
- (b) Thus, if a director who has subscribed the memorandum of association for the qualification shares, subsequently applies for a larger number of shares, and these are allotted to him, the shares thus allotted would include the qualification shares, and it is not necessary that he should take the qualification shares in addition to those thus allotted. (*Ibid.*) X
- (c) In *Fowler's case*, 14 Eq. 316, it was held that a director who applied for new shares in ignorance of allotment of qualification shares, was liable for both. Y

N.B.—But this case was doubted in *Duke's case*, 1 Ch. D. 620.

(39) Shares acquired in breach of trust, whether a sufficient qualification.

Shares acquired by a director secretly from a promoter in breach of trust, would suffice to form his qualification; though this mode of acquiring shares is highly improper and amounts to a misfeasance within S. 214, *infra*. See *Carling's case*, 1 Ch. D. 115; *Hercynia Copper Co.* (1894) 2 Ch. 403; *Innes and Co.*, (1903) 2 Ch. 254. Z

(40) Joint holding of shares, sufficiency of.

- (a) The condition as to qualification would be satisfied by holding the requisite number of shares jointly with some other person. *Dunster's case*, (1894) 3 Ch. 478. A
- (b) Hence an allotment to a firm of which the director is a member is a sufficient qualification. (*Ibid.*) B

2.—“Every other person....member of the Company”—(Continued).

(41) Shares held in trust, sufficiency of.

Shares that are held by a director in trust for another person, and in which the director has no beneficial interest would form a sufficient qualification. *Glory Raper Mills, Dunster's case*, (1894), 3 Ch. 403. C

(42) Mortgage of qualification shares—Effect of.

A director can, without losing his directorship, mortgage his qualification shares. *Cumming v. Prescott*, 2 Y. & C. (Ex) 488; see, also, E.P. Masterman, 4 D. & Ch. 751; 2 M. & Ayr. 209. E. P. Littledale 6 D.M. & G. 714, 728. D

(43) Share warrants—No qualification.

The possession of share warrants does not amount to the possession of qualification shares. See S. 33, *supra*. E

(44) Liability of mortgagee as member.

(a) A person who takes a transfer by way of mortgage is like a trustee, personally liable as a share-holder. *Weiker Schein's case*, 8 Ch. 831; *Royal Bank of India's case*, 7 Eq. 91; 4 Ch. 252; *Addison's case*, 5 Ch. 294. F

(b) As between himself and the Company, the mortgagee is the owner of the shares. See Buckley 9th Ed., p. 64. G

(c) The same rule holds whether the mortgagee is merely a transferee from a share-holder, or arises upon a loan made to the Company itself. See *Addison's case*, 5 Ch. 294. H

(d) An equitable mortgagee of shares is in the position of a *cestui que trust*, and is not liable. See Buckley 9th Ed., p. 365. I

(45) Executor of a deceased member, liability of.

(a) An executor who applies for a transfer of shares standing in the name of the testator, into his own name, is to all intents a member of the Company, and is personally liable in respect of those shares. *Buchan's case*, 4 A.C. 549. J

(b) A Company cannot transfer shares into the name of executors personally, unless there is a distinct and intelligent request by the latter. (*Ibid.*) K

(c) Mere acceptance of dividends in their representative character, would not amount to a request. E.X. *Bulmer*, 33 Beav. 435; *Exp. Gourthwhite*, 3 M. & G. 187; *Exp. Armstrong*, 1 Deg. & S. 565. L

(d) Executors who apply for new shares, after the testator's death, would be personally liable, though the shares have been offered to and accepted by them in their representative character. *Fearnside and Dean's case*?, *Dobson's case*, 1 Ch. 231; *Jackson v. Turquand*, L.R. 4 H.L. 305; *Duff's Executor's case*, 32 Ch. D. 301; *Spencer's case*, 17 Beav. 203; *Mallorie's case*, 2 Ch. 181. M

(e) Executors who incur a personal liability are entitled to indemnity against the estate. *Duff's Executor's case*, 32 Ch. D. 301, 309. N

2.—“Every other person....member of the Company”—(Continued).

(46) Contract for shares, specific performance of.

(a) An agreement to take shares or to allot shares may be specifically enforced. *Odessa Tramways Co. v. Mendel*, (1878), 8 C.D. 235. O

(b) But if the entire share capital has been allotted, and there are no shares available for allotment, a suit for specific performance does not lie; the only remedy is in damages. *Ferguson v. Wilson*, (1866), 2 Ch. 77. P

(47) A person who has agreed to become a member cannot repudiate after winding up.

(a) A person who has agreed to become a member cannot, after the commencement of the winding up, be relieved of the contract into which he has *de facto* entered, whatever be the circumstances which induced him to enter into the agreement. *Challin's case*, 6 Ch. 286. See Buckley, 9th Ed., p. 69. Q

(b) He cannot escape liability on the ground that he has been induced to become a member through fraud or misrepresentation, unless he has, before the commencement of winding up, avoided the contract or taken some steps equivalent to it. *Oakes v. Turquand*, L.R. 2 H.L. 325; *Exp. Storey*, 62 L.T. 791; *Houldsworth v. City of Glasgow Bank*, 5 A.C. 317; *East Broken Hill v. Mallaby-Deesby*, 11 T.L.R. 465; *London Suburban Bank*, 15 Eq. 274. R

(c) Fraud of Company does not entitle a share-holder to repudiate shares to the prejudice of creditors. *Henderson v. British Royal Bank*, 7 E. & B. 356. S

(d) After winding up, a share-holder has no right to rescind the contract; his remedy is only against the persons through whose misrepresentation he was induced to take shares. See *Emden*, 8th Ed., p. 191; Buckley, 9th Ed., p. 69. T

(e) The rule that a person who has agreed to become a member cannot repudiate after winding up, applies only where the contract to take shares is voidable, not void. *Emden*, 8th Ed., p. 191. U

(f) Thus where a person offers for shares in a Company under a mistake induced by the officers of that Company as to its identity with another Company in which the applicant wanted to take shares, no contract is concluded by the acceptance of the offer, and the applicant may escape liability even after winding up. *Baillie's case*, (1898) 1 Ch. 110. Y

(g) Similarly, if a person who agrees to take paid up shares at a discount, and whose name is not entered in the register of the Company, cannot enforce the contract, he cannot on a winding up be made a contributory. *Macdonald Sons and Co.*, (1894) 1 Ch. 89; *Arnot's case*, 36 C.D. 732; *Barnett's case*, 18 Eq. 507, cited in *Emden's Winding up of Companies* 8th Ed., p. 187. W

(h) But if his name is entered on the register, he can, while the Company is a going concern, repudiate the shares, unless he has assented to the liability imposed by the holding of such shares, or has entered into some new agreement to keep them. *Addlestone Linoleum Co.*, 37 C. D. 191; *Exp. Sandy's* 42 C.D. 98; *Eddystone Marine Insur. Co.*, (1893) 3 Ch. 9; *Oakes v. Turquand*, L.R. 2 H.L. 325. X

2.—“Every other person....member of the Company”—(Continued).

- (i) But he cannot escape liability after winding up. *Houldsworth v. City of Glasgow Bank*, 5 A.C. 317; *Addlestone Linoleum Co.*, 37 C.D. 191. Y

N.B.—Even where the contract is void a share-holder may, by delay and acquiescence, debar himself of his right. *Exp. Sandys*, 42 Ch. D. 98; *Wynne's Case*, 8 Ch. 1002, cited in *Emden's Winding-up of Companies*, p. 191.

(48) Repudiation before winding-up.

- (a) If, before winding-up, an allottee, who by reason of misrepresentation is in a position to repudiate, effectually repudiates the shares, and the directors acquiesce, he cannot be made a contributory. *Blake's case*, 84 Beav. 639=12 L.T. 43. *Bell's case*, 22 Beav. 35. Z
- (b) Thus a person who takes share in a Company under the influence of fraud and misrepresentation for which the Company is responsible is entitled to repudiate the shares. But he must exercise the right within a reasonable time after he becomes aware of the fraud and misrepresentation. Otherwise he will not be relieved of his liability as a member in respect of those shares. 72 P.R. 1891. See, also, 2 Ind. Jur. N.S. 296. A
- (c) A person who had been induced by the misrepresentations of the directors in a prospectus, to take shares in a Company, was held entitled to have his contract to take shares set aside. 2 Ind. Jur. N.S. 296. B
- (d) The prospectus, although issued by the promoters before the formation of a Company, is the basis of the contract between the Company and a share-holder for the allotment of the shares, and if the misstatements therein alleged were relied on by him, and were material to the contract, he would be entitled to rescind the contract and repudiate the shares in the absence of laches or conduct on his part which would deprive him of that right. *Karbery's case*, L.R. (1897) Ch. D. 1, followed in 4 C.W.N. 369. C

Quære:—Whether a person can escape liability for calls, on the ground that he was induced to take shares through a misrepresentation made by one B, as an agent of a Company not then in existence. 4 C.W.N. 369. C-1

- (e) A share-holder can repudiate his shares where there is a variation between the prospectus, and the articles of association, provided he acts promptly. *Goldsmid's case*, 16 Beav. 262; *Meyer's case*, 16 Beav. 383; *Merionethshire Slate Co.*, etc. 3 Jur. N.S. 460; *Webster's case*, 2 Eq. 741; *Stewart's case*, 1 Ch. 574; *Ship's case*, 2 De. G. J. & S. 544; *Downes v. Ship*, L.R. 3 H.L. 343; *Bailey's case*, 3 Ch. 592. D
- (f) But a shareholder cannot escape liability on the ground that the objects of the Company as formed are materially different from those as projected, or that there is a discrepancy between the prospectus, and the memorandum, if he has kept his shares without taking steps, within a reasonable time after the formation of the Company to ascertain its objects as formed. *Peel's case*, 2 Ch. 674; *Lawrence's case*, 2 Ch. 412; *Wilkinson's case*, 2 Ch. 537; *Oakes v. Turquand*, L.R. 2 H.L. 325; *Downes v. Ship*, L.R. 3 H.L. 343; *Stewart's case*, 1 Ch. 574, cited in *Emden's Winding-up of Companies*, 8th Ed., p. 191. E

2.—“Every other person....member of the Company”—(Continued).

N.B.—A person who applies for shares in a Company relying on a prospectus, must be deemed to have become aware of any variation between the prospectus and the memorandum at the earliest practicable time. *Peel's case*, 2 Ch. 674.

(g) If an agreement to take shares has not been acted upon within a reasonable time, either party may decline to carry it out. *Exp. London Bank of Scotland*, 12 Eq. 26; *Mackenzie's case*, (Eur. Arb.), L.T. 411=18 Sol. j. 223. F

(h) But not if the applicant is a subscriber of the memorandum. *Levick's case*, 40 L.J. Ch. 180; *Sidney's case*, 13 Eq. 228; *Tooth's case*, W. N. (1868) 270. G

(49) Promoters fraudulently inducing the public to take shares, liability of.

(a) Promoters who have, by misrepresentation that certain portion of the capital has been subscribed, induced people to subscribe for shares, render themselves liable in respect of the balance that has not been subscribed for by other persons. (c) *Moore and Dela Torre's case*, 18 Eq. 661. H

(b) A mere statement in the prospectus, by the directors, of an intention to take a certain number of shares, does not render them liable as members in respect of those shares. *Moore Brothers*, (1899) 1 Ch. 627. I

(50) Alteration of memorandum after application—Effect of.

(a) An alteration after application, in the memorandum of association, by increasing the value of the shares will not bind the allottee having no notice of the alteration. *Gustard's case*, 8 Eq. 438. J

(b) Where a person applied for shares the nominal value of each of which as stated in the memorandum was £20, but before allotment, the value was raised to £40 by a special resolution which was not registered, and the allottee had no notice of the resolution until a year after he had transferred the shares, held that the allottee was bound only by the original contract to take shares of £20 each. *Gustard's case*, 8 Eq. 438, cited in *Buckley on Companies*, 9th Ed., at p. 63. K

(51) Taking unpaid shares under mistake—Effect.

(a) A person who accepts unpaid shares believing under a mistake of law or of fact, that they are paid-up shares would not be relieved from liability. See *Dent's case*, 8 Ch. 765; *Railway Tables Co., E.P. Sandays*, 42 Ch. Div. 98; *Cleland's case*, 14 Eq. 387; *Disderi & Co.*, 11 Eq. 242; *E.P. Daniell*, 23 Beav. 568=1 De G. & J. 372; *Nickoll's case*, 24 Beav. 639; *Re Finance Co.*, 19 L.T. 273; *Imperial Silver Quarries Co.*, 16 W.R. 1220; *Muir v. Glasgow Bank*, 4 A.C. 337. L

(b) Nor is his liability affected by the fact that he took the shares in a representative character, e.g., as an executor or trustee. *Spencer's case*, 17 Beav. 208; *Fearnside and Dean's case*, *Dobson's case*, 1 Ch. 231; *Sculthorpe v. Tipper*, 18 Eq. 232; *Duff's Executor's case*, 32 Ch. Div. 301; *Hoare's case*, 2 J. & H. 229; *Sheriff v. Butler*, 14 W.R. 629; 12 Jur. (N.S.) 329; 14 L.T. 510; *Alexander's case*, (Alli. Arli.) 15 Sol. J. 788. M

2.—“Every other person.... member of the Company”--(Continued).

(52) Cancellation of allotment—When valid.

(a) The allottee would be relieved if the agreement to take shares has been cancelled, even though the memorandum of association has been signed. *Tufnell's case*, 29 Ch. D. 421; *Cf. Adam's case*, 13 Eq. 474; *Suall's case*, 5 Ch. 22. N

(b) But the allottee will not be relieved if the directors have no power of cancellation; *Sidney's case*, 139, 228; *Hall's case*, 5 Ch. 707; *Argyll Coal & Co.*, 54 L.T. 233; *Adam's case*, 13 Eq. 474; *London Coal Co.*, 5 Ch. D. 525; *Duff's Executor's case*, 32 Ch. Div. 301; *Henley's case*, (1878) W.N. 133; *Wallscourt's case*, (1899) W.N. 253=7 Manson 235; *Fletcher's case*, 37 L.J. (Ch.) 49=16 W.R. 75=17 L.T. 196. Q

(c) A cancellation by a director of the liability of a subscriber in respect of his shares, without the sanction of any meeting of the directors, is invalid. In spite of the cancellation the subscriber continues to be a member, and in the event of a winding-up, is liable as a contributory. 7 Bom.L.R. 291. See, also, 20 B. 654. P

(53) Application in another's name.

(a) An allotment to a person who has applied for shares in the name of a fictitious person or who has used another person's name in taking shares for himself, will render the allottee liable as if he has taken the shares in his own name. *Pugh and Sharman's case*, 13 Eq. 566; *Savigny's case*, (1899) W.N. 2=5 Manson, 366. See, also, *E.P. Little*, 17 W.R. 461. Q

(b) But if A does not contract with the Company under an *alias*, but takes shares in the name of B with B's consent, as trustee for A, A is not liable as a contributory. *National Bank of Wales, Nussay's case*, (1907) 1 Ch. 582; cited in *Buckley's Companies*, 9th Ed., at p. 65. R

(c) If A applies for shares for B, and shares are allotted to and registered in the name of B, who knew nothing of the matter and in no way represented himself as a share-holder, neither A nor B is a member. *Coventry's case*, (1891) 1 Ch. 202, cited in *Russel and Bayley*, 3rd Ed., p. 55. See, also, *Buckley*, 9th Ed., p. 66. S

(d) But in such a case A would be liable in damages to the Company and the measure of such damages will be the par value of the shares. *National Coffee Palace Co.*, 24 Ch. Div. 367.

(e) If A applies for shares in B's name without B's consent, but the Company accepts B as the share-holder, A is not liable. *London, Bombay, &c., Bank*, 18 Ch. D. 581. T

(54) Application by an agent.

(a) An application by an agent authorized by his principal to take shares in his (principal's) name, will bind the principal. *Barret's case*, 2 Dr. & Sm. 415=3 D.J. & S. 30=13 W. R. 541. U

(b) The principal is also bound, if he adopts an unauthorised application of the agent. *G.H. Levita's case*, 5 Ch. 489. V

(c) But the agent would be liable if he applies without the principal's consent, and the principal repudiates the shares before winding-up. *Patent File Co., Exp. White*, 16 L.T. 276. W

2.—“Every other person....member of the Company”—(Continued).

- (d) The agent, however, would not be bound in such a case by an authorised application if neither he nor the Company intended that there should be a contract. *Coventry's case*, (1891) 1 Ch. 202. **X**
- (e) An agent who applies for shares in his own name, without disclosing that he acts as agent is liable as if he has taken the shares for himself. *Bird's case*, 4 D.J. & S. 200. **Y**
- (f) Where an agent by mistake applies for shares in a Company not authorised by his principals and an allotment is made, the principal is not liable. *E.P. Pannure*, 24 Ch. D. 367. **Z**
- (g) But the agent would be liable in damages to the Company for misrepresentation of his authority. (*Ibid.*) **A**
- N.B.**—A person appointed as an agent by letter has no authority to act as agent until the receipt of the letter. *Cowan v. O'Connor*, 20 Q.B.D. 640, 642.

(55) Application for shares in the name of a disabled person.

- (a) If a person applies for shares in the name of a person under disability, the applicant is personally liable. *Pugh & Sharman's case*, 13 Eq. 566; *Reaveley's case*, 1 De. G. & S. 550. See, also, *Coventry's case*, (1891) 1 Ch. 202. **B**
- (b) Where a father purchased shares, and signed the transfer in the name of his infant son, and the son's name was put on the register, the father was held liable. *Richardson's case*, 19 Eq. 589; *Manley's case*, 2 Meg. 74, cited in Buckley, 9th Ed., p. 66. **C**
- (c) So also where a father applied for shares in the name of his infant son, cancelling the fact of his infancy, and the allotment to the son was completed, the father was held liable as a contributory. *Reaveley's case*, 1 De G & Sm. 530. **D**
- (d) But the father would not be liable, if the Company knowing the circumstances, repudiate the transaction, and the contract is left incomplete. *Maxwell's case*, 24 Beav. 321. **E**
- (e) But though the father may not be liable as a contributory, he may in such a case if he be a director, be rendered liable in damages, in the winding up, for the amount of calls which cannot be enforced against the infant shareholder. *E.P. Wilson, Re Crenver Co.*, 8 Ch. 45. **F**

(56) Signing a proxy—How far evidence of membership.

- (a) An alleged share-holder who has signed a proxy may thereby, as between himself and the creditors of the Company, be precluded from denying his membership. *Langer's case*, 18 L.T. 67=37 L.J. (Ch.) 292; see, also, *Bridge's case*, 9 Eq. 74=5 Ch. 305; *Dixon v. Evans*, 5 Ch. 79=L.R. 5 H.L. 666, cited in Buckley, 9th Ed., p. 57. **G**
- (b) But such signature may not as between him and the Company be conclusive evidence of membership. *McIlwraith v. Dublin Trunk Railway Co.*, 7 Ch. 134 (140). **H**
- (c) The signature of a proxy may, in an action for calls, preclude a transferee from questioning the validity of the transfer. See *Sheffield Railway Co. v. Woodcock*, 7 M. & W. 574, cited in Buckley, 9th Ed., p. 58. **I**

2.—“Every other person.... member of the Company”—(Concluded).

(57) Stamp duty on letter of allotment.

A letter of allotment of shares in a Company should bear a stamp of one anna.
See *The Indian Stamp Act* (II of 1899), Sch. I, Art. 36. J

(58) Suit for calls—Limitation.

A suit against a share-holder to enforce liability in respect of his shares is not barred by limitation if brought within three years since the date when his name was inscribed in the register of members as the holder of such shares. 17 B. 472 (474). K

(59) Agreement to place shares.

An agreement “to place shares” in the market is not the same as an agreement to take shares, and a person who enters into such an agreement is not liable as a member, though he may be liable in damages for non-performance of his agreement. *Garrison's case*, 8 Ch. 507. See *Buckley* 9th Ed., p. 66. L

(60) Purchase by a Company of its own shares, invalid.

A Company limited by shares cannot purchase its own shares even under a power in this behalf expressly conferred by articles and the memorandum of association. *Trevor v. Withworth*, 12 A.C. 409 (437). M

46. Any transfer of the share or other interest of a deceased member of the Company under this Act made

Transfer by personal representative.

by his personal representative¹ shall, notwithstanding such personal representative may not himself be a member, be of the same validity as

if he had been a member at the time of the execution of the instrument of transfer.

(Notes).

1.—“Any transfer....his personal representative.”

(1) Corresponding English Law.

This section corresponds to S. 29 of the English Companies (Consolidation) Act, 1908. M-1

(2) Personal representative.

(a) The personal representative referred to in the section must be one who has been duly constituted by the law of the country in which the company is registered. See *New York Breweries v. A.G.* (1899) A.C. 62, 70, 71, cited in *Buckley*, 9th Ed., p. 82. See, also, *Russell & Bayley*, 3rd Ed., p. 300. N

(b) Where a share-holder in a company registered in England, was domiciled in America and on his death, the company, transferred his shares into the names of his American executors who had not taken probate in England, and paid dividends to them, *held*, this act constituted the company executors *de son tort* and made them chargeable with probate duty. (*Ibid.*) O

(c) Messrs *Russell & Bayley* state that this case bears strongly on cases that frequently arise in India and suggest that the only safe course open to the companies is to insist on the production of an Indian Probate. See *Russell & Bayley*, 3rd Ed., p. 300. P

I.—“Any transfer....his personal representative”—(Continued).

(3) Transfer by personal representative without being registered as share-holder.

Upon the death of the sole holder of shares, the title to his shares devolves upon his legal personal representatives, who may, subject to any provisions in the articles of association, transfer his shares without being registered as share holders. See Halsbury's Laws of England, Vol. V, p. 196. See, also, Schedule I, Table A, Art. 14, *infra*. *Buchan's* case, 4 App. Cas. 549, 588. Q

(4) Notice of member's death to be given by his personal representative.

It is the duty of the personal representatives to give notice of the member's death as soon as possible. *New Zealand Gold Extraction Co. (Newbery-Vantin Process) v. Peacock*, (1894) 1 Q.B. 622, 632, C.A. R

(5) Right of legal representative to have the shares registered in his name.

(a) The legal personal representative of a deceased share-holder, may, if he likes, have the shares transferred to and registered in his own name. But the Court must be satisfied that the transfer has been authorized by a distinct and intelligent request on the part of the legal representative that the shares should be dealt with in this way. *Buchan's* case, 4 App. Cas. 549, 588; cited in *Russell & Bayley*, 3rd Ed., p. 299. S

(b) A notification by a person that he is an executor does not authorize the company to have the shares registered in his name. (*Ibid.*) T

(c) Where executors claim under articles to be registered as members, the company cannot state on the register that they are executors. *Re Saunders (T.H.) & Co., Ltd.*, (1908) 1 Ch. 415. U

(6) Transfer by one of several executors—Effect.

(a) In companies governed by this Act, one of two executors who have been noted as executors, but in whose names the shares have not been registered, may, subject to the regulations, make a valid transfer. *Barton v. North Staffs Railway Co.*, 38 Ch. D. 459. Y

(b) But, in a company which is not governed by the provisions of this section or any other similar provision, if the names of the legal personal representatives, are entered in the register, even though under the description of executors, they become joint share-holders in their individual capacity, and any transfer of the shares must be signed by all of them. *Barton v. L. & N.W. Railway Co.*, 38 Ch. D. 458; cited in *Buckley*, 9th Ed., p. 82. W

(7) Forged transfer.

A transfer by one executor to which the signature of the other is forged does not pass a moiety or any other part of the shares or stock, but is inoperative altogether. *Barton v. L. & N.W. Railway Co.*, 24 Q.B. Div. 77. See *Buckley*, 9th Ed., p. 82. X

(8) Executor can give a good legal title.

The assignee of a bankrupt share-holder took possession of the certificate of shares. Five years afterwards, the company, having no notice of the bankruptcy, issued to the share-holder's executrix duplicate certificates on a statutory declaration that the original certificates had been lost.

1.—“Any transfer....his personal representative”—(Concluded).

The executrix sold the shares and executed a transfer, and it was registered. The purchaser's title was a legal title and prevailed against the assignee. *London and Provincial Telegraph Co.*, 9 Eq. 653. See Buckley, 9th Ed., p. 82. Y

(9) Liability of personal representatives—Extent of.

(a) Unless they are registered as members with their consent, the personal representatives of a deceased share-holder are liable for calls only in their representative capacity, and their liability is limited to the assets in their hands, properly administered. *Duff's Executors' case*, (1836) 32 Ch. D. 301, C.A.; *Buchan's case*, (1879) 4 App. Cas. 549. See, also, *Baird's case*, (1870) 5 Ch. App. 725; *Ex parte Blakley's Executors*, (1852) 3 Mac. & G. 726; *Ex parte Gough-waite*, (1851) 3 Mac. & G. 187; *Keen's Executors' case*, (1853) 3 De. G. M. & G. 272. C.A.; *Howard v. Whentley*, (1853) 3 Deg. M. & G. 623, C.A., *Re Herefordshire Banking Co.*, *Bulwer's case*, (1864) 33 Beav. 435; *Fearnside and Dean's case*, *Dobson's case*, (1865) 1 Ch. App. 231; cited in Halsbury's Laws of England, Vol. V, p. 491. Z

(b) But if they get the shares registered in their names, they become personally liable as members though they have in such a case a right of indemnity against the estate. *Duff's Executors' case*, (1836) 32 Ch. D. 301; *Buchan's case*, (1879) 4 App. Cas. 549. A

(c) The mere noting of probate or letters of administration does not make the executors personally liable. *Duff's Executors' case*, 32 Ch. D. 301; cited in Russell & Bayley, 3rd Ed., p. 300. B

(d) Nor does the mere receipt of dividends have that effect. *Hereford Banking Co.*, 33 Beav. 435; *St. George's Steam Packet Co.*, 2 H. & T. 221. C

(e) Where new shares are offered to the members, while the name of a deceased member is on the register, the executors may, claim the testator's portion. *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.*, (1896) 1 Ch. 457, C. A. See Halsbury's Laws of England, Vol. V, p. 197. D

N.B.—But they can take the shares only in their individual capacity and not in their representative capacity, though they have a right of indemnity against the estate. *Duff's Executors' case*, (1836) 32 Ch. D. 301; *Dobson's case*, (1865) 1 Ch. App. 231. E

47. Every Company under this Act shall cause to be kept in one or more books a register of its members ¹, and there shall be entered therein the following particulars:—

Register of members.

- (a) the names and addresses, and the occupations, if any, of the members of the Company, with the addition, in the case of a Company having a capital divided into shares of a statement of the shares held by each member ², distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member ³;

- (b) the date at which the name of any person was entered in the register as a member;
- (c) the date at which any person ceased to be a member.

Where a share-warrant has been issued ⁴ under section 30, until the warrant is surrendered, the particulars mentioned in section 34 shall be deemed to be the particulars which are required by this section to be entered in the register of members of a Company; and, on the surrender of a warrant, the date of such surrender shall be entered as if it were the date at which a person ceased to be a member.

Any Company acting in contravention of this section shall incur a penalty not exceeding fifty rupees for every day during which its default in complying with the provisions of this section continues, and every director or manager of the Company who knowingly and wilfully authorises or permits such contravention shall incur the like penalty.

(Notes).

Corresponding English Law.

The whole of this section except the paragraph dealing with share-warrants exactly corresponds to S. 25 of the English Companies (Consolidation) Act, 1908, with this difference that under the English Law the penalty is £5, not Rs. 50. The para dealing with share-warrants corresponds to the last para of S. 37 of the English Act. F

I.—“Every Company....a register of its members.”

(1) Register may consist of several books.

The information required by the section need not be contained in a single book. It may be entered in different books, in which case all the books will, together, constitute the register. *Weikersheim's* case, 8 Ch. 831, 836. See, also, *Inglis v. Great Northern Railway Co.*, 1 Macq. 112 H.L. G

(2) Register to be kept properly.

It is the duty of the company to keep the register properly. *Per Westrapp, J.* in 3 B.H.C.R. (O.C.J.) 133. H

(3) Register not invalidated by slight irregularities.

(a) A register which substantially contains the information required by the act is not invalidated by unimportant omissions and deviations. 3 B. H.C.R. (O.C.J.) 106. I

(b) A book or document intended to be a register may be admitted in evidence as such, although the requirements of the Act as to how it should be kept, have not been regularly complied with. *Ex parte Cammell*, (1894) 2 Ch. 892, C.A., cited in Halsbury's Laws of England, Vol. V, p. 148. J

1.—“Every Company....register of its members”—(Continued).

(c) Thus, allotment sheets containing the names and addresses of the applicants for shares, the number of shares allotted to each, together with the dates of allotment, are sometimes treated as the register, until the formal book is prepared. *E. P. Cammell*, (1894) 1 Ch. 528=2 Ch. 392. See, also, *Nicolas & Lawrence*, 3rd Ed., p. 91. K

N.B.—But rough memoranda or sheets of paper intended as materials from which a register might be prepared are not a register. (*Ibid.*) K-1

(4) Power for company to keep branch register.

(a) Under the English Law, a company having a share capital, whose objects comprise the transation of business in a Colony may, if so authorized by its articles, cause to be kept in any Colony in which it transacts business, a branch register of members resident in the Colony. See S. 34 (1) of the Companies (Consolidation) Act. L

N.B.—The term Colony in the section includes *British India*.

(b) There is no similar provision in the Indian Act; and it is doubtful whether a company can, unless expressly authorized, so to do, keep two registers. In *Sand's* case, 32 L.T. 299, it was held that a company having Foreign and English share-holders could keep two registers—one at home and another abroad. But Buckley questions the correctness of this view. He says “the Companies (Colonial Registers) Act, 1833 = Ss. 34, 35, 36 of the present Consolidation Act was passed to cover the difficulty of there being no provision for keeping local registers. Buckley, 9th Ed., pp. 71, 72. M

(5) Commencement of register.

The register must commence from the date of the registration of the Company and shall be kept at its registered office. See S. 55, *infra*. N

(6) Lien, not to be entered in the register.

The company must not enter in the register a statement that it has a lien on the shares of a member. *Re Key (W.) & Son, Ltd.*, (1902) 1 Ch. 467. O

N.B.—The company cannot insist on putting on the register anything except what is required by the Act to be inserted therein. *Re Saunders (T. H.) & Co.*, (1908), 1 Ch. 415; cited in *Halsbury's Laws of England*, Vol. V, p. 149. P

(7) Register, evidentiary value of.

(a) The register of members is only *prima facie* evidence of the matters directed or authorized by this Act to be inserted therein. Even in proceedings where the register cannot be rectified, evidence may be received to prove that the entries in it are false. See S. 60, *infra*; see, also, 9 W.R. 539; *Briton Medical Association*, 39 Ch. D. 61. Q

(b) It is open to a person whose name is on the register, or omitted from it, to show that he ought not or ought to have been registered; 9 W.R. 539; see, also, *Carmarthen Rail. Co., v. Wright*, (1858) 1 F. & F. 282; *Portal v. Emmens*, (1876), 1 C.P.D. 201; 212, affirmed in 1 C.P.D. 664, C.A.; *Hallmark's* case (1878) 9 Ch.D. 329, C.A. R

1.—“Every company....a register of its members”—(Concluded).

- (c) Inaccuracies or omissions, in the register do not necessarily prevent it from being adduced in evidence. *Wills v. Murray*, (1850) 4 Ex. 343; *Bain v. Whitehaven & Furness Junction Rail. Co.*, (1850), 3 H.L. case 1; *Southampton Dock Co. v. Richards*, (1840) 1 Man. & G. 448; *London & Brighton Rail. Co. v. Fairclough*, (1841) 2 Man. & G. 674. S

(8) Entries in the register may estop the Company.

A person who obtains a transfer of shares, is, unless he has notice to the contrary, entitled to assume the correctness of the entries in the register and share certificate as to the amount paid-up on the shares purchased by him and cannot be made liable for, such amount though, as a matter of fact, it has not been paid. *Nicoll's case*, *Barkinslaw v. Nicolls*, 7 Ch. D. 533=3 A.C. 1004, S.C. 29; *Spargo's case*, 8 Ch. 407, 410; and see *Guest v. Worcester Railway Co.*, 4 C.P. 9, cited in Buckley, 9th Ed., p. 72. T

2.—“A statement of the shares....member.”

(1) Appropriation of shares.

“Every share is or ought to be appropriated to somebody or other in the share register, and the creditors must search and look at the share register, which is to be their guide, in order to find whom they are to apply to, in case a necessity should arise for a contribution in consequence of their money not being paid.” *Per Lord Hatherly in Buchan's case*, 4 App. Cas. 592. U

(2) Omission of denoting number—Effect of.

Where the denoting numbers of all the shares are not given separately but only the first and the last, without the intermediate ones, it may, reasonably, be inferred, that the numbers omitted were those which were intermediate between the numbers given. *Bain v. Proprietors Whitehaven R. Co.*, 3 H.L.Cas. 1, cited in 3 D.H.C.R. (O.C.J.) 104, 111. U-1

N.B.—In England contracts for the sale, etc. of share or stock or other interest of any Joint Stock Banking Co. are void unless the numbers by which the shares are distinguished as set forth in the contract. 30 Vict.C. 29. Y

3.—“Of the amount paid....each member.”

(1) Payment in money's worth.

- (a) If shares have been paid for, not in money, but in money's worth, the register should properly state the extent of such money's worth paid up although no money has passed. *Anglesea Colliery Co.*, 2 Eq. 379=1 Ch. 555. W

- (b) To the extent to which the shares are unpaid, the share-holder is under an obligation to pay in cash. See Buckley, 9th Ed., p. 72. X

(2) Contract to set off calls against value of goods to be supplied—Validity.

Semble:—A contract on the part of the company that calls shall be set off against the value of goods to be supplied by the share-holder instead of being paid in money is *ultra vires*. *Pellate's case*, 2 Ch. 527; *E. P. Clarke*, 7 Eq. 550. See Buckley, 9th Ed., p. 77. Y

3.—“Of the amount paid....each member”—(Concluded).

Quære:—Whether, having regard to this section, an arrangement would be valid, under which a member advances money to the company on condition that the advance is to be treated as a loan to the company or as payment in anticipation of calls according as the company is able to carry on its business or is wound up. See Buckley, 9th Ed., p. 72. **Z**

N.B.—Such an arrangement entered into, after the Company is wound up, is void, as it involves an alteration in the status of the member. See *Barge's case*, (1868) L.R. 5 Eq. 420.

4.—“Where a share warrant has been issued.”

(1) Member's name to be struck off the register on the issue of a share warrant.

On the issue of a share warrant, the Company shall strike out of the register of members, the name of the holder of the warrant as if he had ceased to be a member, and shall not re-enter his name in the register until the warrant is surrendered for cancellation. See Ss. 34, 32, *supra*.

(2) Alteration of register on conversion of capital into stock. **A**

Where a Company having a share capital has converted a portion of its capital into stock, and has given notice of such conversion to the Registrar as required by S. 51, *infra*, the register of members shall show the amount of stock held by each members in the list, instead of the amount of shares and the particulars relating thereto required by the section. See S. 52, *infra*. **B**

N.B.—As to the rights of members and other persons to inspect and require copies of the register of members, see S. 55, *infra*. **B-1**

N.B.—As to the power of the Court to rectify the register before and after winding up, see Ss. 58 and 147, *infra*. **C**

48. Every company under this Act and having a capital divided into shares shall make, once at least in every year, a list of all persons¹ who, on the fourteenth day succeeding the day on which the ordinary general meeting, or, if there is more than one ordinary general meeting in each year, the first of such ordinary general meetings, is held, are members of the Company. Such list shall state the names, addresses and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:—

Annual list of members.

(a) the amount of the capital of the Company and the number of shares into which it is divided;

(b) the number of shares taken from the commencement of the Company up to the date of the summary;

(c) the amount of calls made on each share;

(d) the total amount of calls received;

- (e) the total amount of calls unpaid ;
- (f) the total amount of shares forfeited ; 2
- (g) the names, addresses and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section ; and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies.

(Notes).

General.

Corresponding English Law.

This and the two following sections correspond to S. 26 of the English Companies (Consolidation) Act with the following points of difference:—

- (a) The English Act provides for including in the first annual list the names, etc., of persons who have ceased to be members since the date of the incorporation of the company. There is no corresponding provision in the Indian Act. Cl. (g) of the present section which provides for the inclusion in the annual list the names, etc., of persons who have ceased to be members *since the last was made*, has reference only to second and the succeeding annual lists. **C**
- (b) The present section merely provides for inclusion in the list, of the names, addresses and occupations of existing and past members together with the number of shares held by them, while, under the English law, the annual list should also specify the shares transferred both by existing and past members since the date of the last return, or in the case of the first return, since the date of incorporation and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid-up otherwise than in cash. **D**
- (c) Moreover, under the English Law, the annual list and summary should include the following particulars:—
 - (i) The total amount of sums (if any) paid by way of commission in respect of shares or debentures, or allowed by way of discount in respect of any debentures, since the date of the last return. See S. 26 (2), cl. (f) of the English Act.
 - (ii) The names and addresses of persons who, at the date of the return, are the directors of the company, or occupy the position of directors, by whatever name called. S. 26 (2), cl. (1). (*Ibid.*)
 - (iii) The total amount of debt due from the company in respect of all mortgages and charges which are required (or in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the Registrar of companies. S. 26 (2), cl. (m).
 - (iv) The summary, in the case of public companies, must also include a statement, made up to such date as may be specified therein, in the

General—(Concluded),

form of a balance sheet audited by the company's officers, and containing a summary of its share capital, its liabilities and its assets, giving such particulars as will disclose the general nature of those liabilities and assets, and how the value of the fixed assets has been arrived at, but the balance sheet need not include a statement of profit and loss. S. 26 (3). (*Ibid.*) **E**

1.—“Shall make.... a list of all persons.”**(1) Year, meaning of.**

“Year” means a calendar year, i.e., the period from 1st January to 31st December, and does not mean a period of twelve months from the date of the registration of the company. *Gibson v. Barton*, L. R. 10 Q.B. 329; *Edmonds v. Foster*, 33 L.T. 690. **F**

(2) List to be in accordance with the facts.

The requirements of the section are not satisfied if the list and the summary are not in accordance with the facts. *Briton Medical and General Life Association*, 39 Ch. D. 61; see Russell and Bayley, 3rd Ed., p. 64. **G**

(3) Total amount of capital uncalled.

The list will not necessarily show what amount of capital is uncalled. Thus, on the one hand, if the regulations of the company provide that a certain proportion of profits shall not be paid to, but shall be credited in account to, the share-holders by way of addition to the amount paid on their shares, this will not appear in the accounts directed by cls. (c) and (d), but the amount remaining uncalled will be *pro tanto* diminished. The list will not, therefore, show this at all, for cl. (e) is of course only an account of calls made and not paid. See Buckley, 9th Ed., p. 74; see, also, *Cathie's case* (Eur. Arb.) L.T. 18=Reil 27=17 Sol. J. 29. **H**

N.B.—For form of annual summary, see second schedule, Form E, *infra*.

2.—“The total amount of shares forfeited.”**(1) Forfeiture not noted in register, validity of.**

A forfeiture otherwise valid, is not invalidated by the fact that it is not mentioned either in the register of members or in the annual list. *Lyster's case*, 4 Eq. 233, cited in Russell & Bayley, 3rd Ed., p. 64 and Buckley, 9th Ed., p. 74. **I**

49. After the issue by the Company of a share-warrant, the annual summary required by section 48 shall contain the following particulars (namely):—

Particulars to be contained in annual summary. the total amount of shares or stock for which share-warrants are outstanding at the date of the summary, and the total amount of share-warrants which have been issued and surrendered respectively since the last summary was made and the number of shares or amount of stock comprised in each warrant.

(Note).

Corresponding English Law.

This section corresponds to S. 26 (2), cl. (h), (i), (k) of the English Companies (Consolidation) Act of 1908. J

50. If any Company under this Act and having a capital divided into shares makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary ¹ as is hereinbefore mentioned to the Registrar, such Company shall incur a penalty not exceeding fifty rupees for every day during which such default continues and every director and manager of the Company who knowingly and wilfully authorises or permits such default shall incur the like penalty ².

Penalty on Company, etc., not keeping a proper register.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to cl. (5) of S. 26 of the English Companies (Consolidation) Act of 1908. K

(2) Marginal note.

The marginal note to the section is wrong. The penalty for not keeping a proper register is provided for by S. 47. This section provides for penalty for not forwarding the annual list or summary to the registrar. See Russell & Bayley, 3rd Ed., p. 65. L

I.—“ If any Company....summary.”

(1) Default under the section, continuing criminal offence.

(a) See *Reg v. Catholic Assurance Institution*, 48 L.T. 675; *Reg v. Tyler*, (1891) 2 Q.B. 588. M

(b) Penalties can be recovered for default made in previous years. *Reg v. Catholic Assurance Institution*, (1883) 48 L.T. 675. N

(2) Liability for misleading statements.

The Company may be convicted if the statement in the return is misleading. *Grosvenor Bank v. Boaler*, (1885) 49 J.P. 774; see Evans & Cooper, p. 37. O

(3) Enquiry into the truth of statements in the list.

A Magistrate who tries an offence under this section is not precluded from inquiring into the truth of the statements contained in the summary, merely because, such statements are in accordance with the register which the Magistrate has no power to rectify. Though under S. 58, *infra*, the power of rectifying the register is vested only in the principal Court of Original Civil Jurisdiction in the district or place in which the registered office of the Company is situated, still, the register is only *prima facie* evidence of its contents, and if the Magistrate, upon evidence, finds that the entries in the register are fictitious he may treat the summary as false, though he has no power to rectify the register. See *Briton Medical Association*, 39 Ch. D. 61, cited in Buckley, 9th Ed., p. 74; See, also, Russell & Bayley, 3rd. Ed., p. 65; Evans & Cooper, p. 37. P

2.—“Every director . . . penalty.”

Manager, meaning of.

‘Manager’ includes a manager *de son tort*; a secretary, and a former director have been held liable as managers. *Gibson v. Barten*, L.R. 10 Q.B. 329; see, also, *Edmonds v. Foster*, 33 L.T. 690; *Coventry & Dixon’s* case, 14 Ch.D. 660; *Rez v. Lawson*, (1905) 1 K.B. 541. Q

51. Every Company under this Act having a capital divided into shares that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, shall, within fifteen days of such consolidation, division or conversion, give notice to the Registrar of Joint-Stock Companies of the same, specifying the shares so consolidated, divided or converted.

Company to give notice of consolidation or of conversion of capital into stock.

(Notes).**General.****(1) Corresponding English Law.**

This section corresponds to S. 42 of the English Companies (Consolidation) Act of 1908.

The English Act, however, does not fix the period within which the notice to the Registrar is to be given. R

(2) Notice to Registrar, how served.

The notice to the Registrar may be served by sending it through the post by a registered letter, or by delivering it to him or by leaving it for him at his office. See S. 89, *infra*. S

52. Where any Company under this Act and having a capital divided into shares has converted any portion of its capital into stock and given notice of such conversion to the Registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the capital as is converted into stock; and the register of members hereby required to be kept by the Company and the list of members to be forwarded to the Registrar shall show the amount of stock held by each member in the list, instead of the amount of shares and the particulars relating to shares hereinbefore required.

Effect of conversion of shares into stock.

(Note).**Corresponding English Law.**

This section corresponds to S. 43 of the English Companies (Consolidation) Act of 1908. T

53. No notice of any trust, express, implied or constructive, shall be entered on the register or be receivable by the Registrar ¹ in the case of Companies under this Act and registered in British India.

Entry of trusts
on register.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 27 of the English Companies (Consolidation) Act of 1908. But that section applies only to Companies registered in England or Ireland and not to Companies registered in Scotland. In Scotland it is the practice to notice trusts on the register. But the object of such notice is to exclude the personal liability of the trustees or to the limit their liability to the amount of the trust-estate, but, merely to mark the shares as the property of the particular trust. See *Muir v. Glasgow Bank*, 4 A.C. 337. U

1—"No notice....Registrar."

(1) Object of the section.

"The object of the section is (1) to relieve the company from taking notice of equitable interests in shares, and (2) to preclude persons claiming under equitable titles from converting the company into a trustee for them. Buckley, 9th Ed., p. 75. Y

(2) Companies, not to take notice of equitable interests in shares.

- (a) Companies have nothing whatever to do with the relation between trustees and their *cesti que trustent* in respect of the shares of the company. They can only look to the man whose name is on the register, and cannot look behind the register, to look whether the registered share holder is the beneficial owner. *Mexican Mining Co., re Perkins*. 24 Q.B.D. 613 (616); *Pulbrook v. Richmond Mining Co.*, 9 Ch.D. 610. W
- (b) A Company is not required to enquire whether trustees who are registered share-holders are acting within their powers in dealing with the shares. *Simson v. Molson's Bank*, (1895) App. Ca. 270, cited in *Gore-Browne & Jordon*, 30th Ed., p. 60. X
- (c) Trustees who held shares in a bank under a will upon trust for S transferred the shares to a person who was entitled to them, the transfer was registered by the bank, and then transferee disposed of the shares so as to defeat the rights of S. *Held*, the bank was not liable to S though a copy of the will was deposited in the bank, and the President of the bank was one of the executors of the will. (*Ibid.*). Y
- (d) The registered share-holder, though a trustee, is a person 'holding in his own right' e.g., for the purpose of qualification as a director. *Pulbrook v. Richmond Mining Co.*, 9 Ch. 610. Z

N.B.—But he is not a holder "in his own right" within the meaning of S. 14 of the Judgments Act, 1838 (1 & 2 Vict. C. 110), and a charging order cannot be made on shares held in trust by him for a debt due from him. *Gill v. Continental Union Gas Co.*, L.R. 7 Ex 332; *Blakey Ordnance Co.*, *Coate's case*, 35 L.T. 617. The Decision in *Oragg v. Taylor*, L.R. 2 Ex. 131, to the contrary is not binding now. See *Cooper v. Griffin*, (1892) 1 Q.B. 740, 745. See, also, Buckley, 9th Ed., p. 77. A

1.—“No notice....Registrar”.—(Continued).

(3) Position of Trustees and Executors, compared.

- (a) “Trustees have not, in any proper sense of the word, a representative character, but executors have; having representative rights, they are entitled to produce the evidence of them to the Company for the purpose of having their title in some way recorded and recognized, without making themselves personally liable.” *Per Lord Selborne*, in *Bell's case* 4 A.C. 547. See, also, *Buchan's case* 4 A.C. 549; *Duffs' Executor's case*, 32 Ch. Div. 301. B

N.B.—S. 126, *infra*, distinctly recognizes the representative character of executors.

- (b) An executor does not become personally liable for calls, unless the shares are registered in his name with his consent. *Glasgow Bank, Buchan's case*, 4 A.C. 549, 588, 594. C

(4) Priority between equitable claims to shares how determined.

- (a) Where the shares of a Company are equitably assigned or mortgaged more than once, as between the assignees or mortgagees, priority will be determined by the priority of the assignment or mortgages, and not by priority of notice thereof given to the Company. *Soc. Generale v. Tramways Union*, 14 Q. B. Div. 425; *Soc. Generale v. Walker*, 11 A. C. 20. D

- (b) As between two persons claiming title to shares registered in the name of a third person, priority of title prevails, unless the second in point of time can show that as between himself and the Company and before the Company received notice of the claim of the first claimant, that he the second claimant, had acquired the full status of a share holder; or at any rate that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the Company, which, as between the Company and the second claimant, the Company could not have refused to do forthwith, so that, as between himself and the Company, he may be said to have acquired, in the words of Lord Selborne, “a present, absolute, unconditional right to have the transfer registered, before the Company was informed of the existence of a better title.” *Romer, J., in Moore v. N.W. Bank*, (1891) 2 Ch. 603. E

- (c) The principle of *Dearle v. Hall*, (1828) 3 Russ. 1, as to the effect of notice in determining the priorities of equitable rights, is inapplicable to shares in such a Company. *Per Lord Selborne in Society General de Paris v. Walker*, 11 App. Cas. p. 30. F

N.B.—Though a Company is not bound to take notice of equitable interests in shares, still, where a transfer is presented for registration, it is not bound to register the transfer at once, but is entitled to wait for a reasonable time, though the transfer is in order, and if, before the transfer is registered, it receives notice of a prior equitable title, it may refuse to register the transfer, for, a title which is inchoate only is not sufficient to defeat a prior equitable title. *Roots v. Williamson*, 38 Ch. D. 485. G

N.B.—Under the English Law a person having an equitable interest in shares can, by taking proceedings under 5 Vict. C. 5, S. 4 and R.S.C. Ord. 46,

I.—“No notice....Registrar”—(Continued).

restrain the company from allowing the shares to be transferred by the registered holder to the prejudice of his equitable claim. See *Bimby v. Ince Hall Coal Co.*, (1866) 35 L.J. Ch. 363, cited in Buckley, 9th Ed., p. 76; see, also, Evans & Cooper, p. 37. H

(5) Notice affecting company's lien.

(a) Though the section relieves companies from taking notice of trusts, still, a Company having by its articles a lien on every share for the debts due from the holder to the company cannot claim priority in respect of moneys which become due from the share-holder to the company after the company has received notice of a charge over that share given to some other person. *Bradford Banking Co. v. Briggs*, 12 App. Ca. 29, applying the principle of *Hopkinson v. Roll*, 5 H.L.C. 514. I

(b) In such a case, the notice is not notice of a trust within the section, but it is a notice affecting the company in their capacity as traders, *Bradford Banking Co. v. Briggs*, 12 App. Ca. 29. J

(c) Such notice cannot bind the company, unless it is given to the company itself through its proper officer, or is received by the company in the course of the transaction of the business. A casual notice received by the secretary, not in the capacity of secretary, but as an individual, is not enough. *Societe Generale v. Tramways Union*, 14 Q.B.D., 424, 438. K

(d) A notice required to be served upon the company may be served by leaving the same or sending it through post by a registered letter addressed to the company, at their registered office. See S. 121, *infra*. L

(6) Lien can exist only for the debt of the registered share-holder.

The company can have lien only for the debt of the registered holder. Hence if the registered holder is a trustee the company can have lien, only for the debt due from the trustee, but not for a debt due from the *cesti que trust*. *Mexican Mining Co., Re Perkins*, 24 Q.B.D. 613; *Ystalyfera Gas Co.*, (1887) W.N.30; *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302. M

(7) Lien not extinguished by acceptance of unmatured bills.

(a) A company's lien for the debts of a share-holder is not extinguished by the share-holder giving unmatured bills for his debt, but it prevails over all charges created after the giving of the bills, and before their maturity. *Re London, Birmingham and South Staffordshire Banking Co.*, (1865), 34 Beav. 332. N

(b) But, the lien will not prevail over the title of the *cestui que trust*, if the company had notice of the trust before the trustee's debt was incurred. *Reardon v. Provincial Bank*, (1896) 1 I.R. Rep. 532. O

(8) Liability of trustees.

(a) As between the registered shareholder and his *cestui que trust* in their relation to the company, the former is the person who is liable for all payments which have to be made in respect of the trust estate and his liability is the same as if he was the beneficial owner. *Muir v. City of Glasgow Bank*, (1879) 4 A.C. 337; *London and Brazilian Bank v. Brocklebank*, (1882) 2 Ch.D. 302. P

I.—“No notice....Registrar”—(Continued).

- (b) If therefore, shares are *bona fide* purchased in the name of a nominee, and there is nothing to show *mala fides*, the nominee is liable in respect of them. *King's case*, 6 Ch. 196. **Q**
- (c) This is so even though the object of the *cestui que trust* was expressly to avoid liability in respect of the shares. See *W.W. William's case*, 1 Ch. D. 576. **R**
- (d) A trustee cannot escape liability on the ground that, to the knowledge of the company, he is only a trustee of the shares registered in his name. *Chapman and Barker's case*, (1867) L.R. 3 Eq. 361; *Muir v. City of Glasgow Bank*, (1879) 4 App. Cas. 337, 360; *Barret's case*, (1864) 4 De. G. J. & Sm. 416; *Re Phoenix Life Assurance Co., Hore's case*, (1862) 2 John & H. 229; *Gray's case*, (1876) 1 Ch. D. 664, cited in Halsbury's Laws of England, Vol. V, p. 150. **S**
- (e) The liability of a trustee is not limited to the amount of the trust estate. *Muir v. City of Glasgow Bank*, (1879) 4 A.C. 337; *Hoare's case*, 2 J & H. 229. **T**
- (f) In the absense of *mala fides* the *cestui que trust* cannot be made liable; *Bugg's case*, 2 Dr. & Sm. 452; *William's case*, 1 C.D. 577; *Leif-child's case*, 1 Eq. 231; *Bunn's case*, 2 De G. F. & J. 275; *Barret's case*, 4 De. G. & J. S. 416 &; *Davidson's case*, 3 De. G. & S. 21, cited in Emden's Winding up of Companies, 8th Ed. p. 203. **U**
- (g) The company cannot claim to set off a debt due to a *cestui que trust*, against calls due in respect of the shares held in trust for him, when the shares are in the name of trustees. *Imperial Merc. Credit Ass.*, 16 L.T. 314. *E.P. Mexican Mining Co., re Perkins*, 24 Q.B. Div. 613. **V**
- (h) The liability is the same even when the company itself is the *cestui que trust*. *Chapman and Barker's case*, 3 Eq. 361; *Universal Banking Corporation, E.P. Challis*, 16 W.R. 451 = 17 L.T. 637; *Easum's case*, (Alb. Arb.) 15 Sol. J. 750; *Cree v. Somervail*, 4 A.C. 648. **W**
- (i) If there are several trustees, they are liable in respect of shares standing in their names, *in solido* each for the total amount, and not *pro rata parte* each for his proportion. *Cunningham v. City of Glasgow Bank*, 4 App. Cas. 607; *Gillespie's case*, 4 App. Cas. 632; See Buckley, 9th Ed., p. 77; Russell & Bayley, p. 68; Emden's Winding up of Companies, 8th Ed., p. 203. **X**
- (j) A trustee does not cease to be liable upon resignation, if he does not also transfer his shares or take such other steps as may be necessary to put an end to such liability. *Mitchel's case*, and *Rutherford's case* 4 A.C. 548; *Ker's case*, 4 A.C. 549, cited in Emden's Winding up of Companies, 8th Ed., at p. 204. See, also, Russell & Bayley, 3rd Ed., p. 69. **Y**
- (k) A trustee is not liable if shares have not been transferred to his name and he has not become a member. *Hall's case*, 3 De. G. & Sm. 80 = 1 Mac. & G. 307. **Z**
- (l) If there is an arrangement between a company and its trustee that his name shall not be placed on the register except by his own direction, and accordingly he has not been registered before the winding-up, the liquidator cannot, afterwards, register him and make him contributory. *Gray's case*, 1 Ch. D. 664. **A**

1.—“No notice....Registrar”—(Continued).

(9) Liability of *cestui que trust*.

- (a) It is only when there is a *bona fide* trusteeship that the *cestui que trust* is not liable. If the trust is only colourable or fraudulent the real owner can be made a contributory. *Chinnock's case*, Joh. 714. **B**
- (b) Thus, if a member in a failing company, in order to escape liability, transfers his shares to a pauper, reserving to himself the beneficial interest therein, he and not the transferee is the contributory. See *Costello's case*, 2 D.F. & J. 802; *E.P. Parker*, 2 Ch. 685; *South London Fish Market Co.*, 39 Ch. D. 324. **C**

N.B.—There is a broad distinction between the case of a share-holder transferring his shares and that of a person who, not being a share-holder purchases shares in the name of a trustee. If a share-holder executes a transfer, which is fraudulent and improper, then, the transfer being set aside, the former share-holder remains a share-holder and is a contributory. But, if a person has never been a share-holder, and has never contracted with the company to become a share-holder, but has done nothing more than purchase shares in the name of a trustee, it is not easy to see what equity there can be to make such a person a contributory. See Buckley 9th Ed. p. 80; see, also, *King's case*, 6 Ch. 196; *National Bank of Wales, Masseyt's case*, (1907) 1, Ch. 582. **D**

(10) Shares purchased in a false name—Liability for.

If a person applies for shares in the name of a fictitious person, or in the name of another person without his consent, the applicant will be personally liable. *Pugh's case*, *Sharman's case*, 13 Eq., 566 followed in *Savigny's case*, (1899) W.N. 2=5 Manson, 836. **E**

N.B.—But if a person not intending to take shares for himself fraudulently applies in the name of another person without his consent, neither the applicant, nor the other person is liable as a contributory, though the applicant will be liable, in damages, to the company for fraud. *Coventry's case*, (1891) 1 Ch. 202. **F**

(11) Trustee's right to indemnity.

- (a) As between the trustee and the *cestui que trust*, the latter is the share-holder and is bound to indemnify the trustee to the extent of all calls made or threatened. *Butler v. Cumston*, 7 Eq. 16; *James v. May*, L. R.H.L. 328; *Cruise v. Paine*, 6 Eq. 641=4 Ch. 441; *Hemming v. Maddick*, 7 Ch. 305; *Hughes Hallett v. Indian Mammoth Co.*, 22 Ch. D. 561; *Whittaker v. Kershaw*, 44 Ch. D. 320. **G**
- (b) The personal obligation of the *cestui que trust* to indemnify the trustee for payments made is not limited to the amount of the trust property. *Hardoon v. Belittis*, (1901) A. C. 118, 124. **H**
- (c) The right to such an indemnity is involved the relationship between a trustee and a *cestui que trust* who is *sui juris*. (*Ibid.*) **I**
- (d) This right to indemnity is one between the trustee and his *cestui que trust* only, and cannot be asserted against strangers, e.g., against a creditor of the *cestui que trust*. *Chayman and Barker's case*, 3 Eq. 361 *Easum's case* (Alb. Arb.), 15 Sol. J. 750. **J**

1.—“No notice....Registrar”—(Concluded).

- (e) Thus, if the company itself is *cestui que trust*, the right to indemnity will be a question between the trustee and the company, i.e., the other share-holders. But, the trustee cannot assert that right against the creditors, and the out side world. (*Ibid.*) K
- (f) A trustee cannot maintain an action to enforce his right to indemnity unless the liability has been or is about to be enforced against him. See *Hughes-Hallett v. Indian Mammoth Co.*, 22 Ch. D. 560. L
- (g) Where no call has been made, and there is no evidence to show whether calls are likely to be made, an action for indemnity is liable to be dismissed as merely *quia timet* and premature. *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch.D. 561, *Where Ranelagh v. Hayes*, 1 Vern 189, was not followed. See, Russell and Bayley, 3rd Ed., p. 69; Buckley, 9th Ed., p. 78; Halsbury's Laws of England, Vol. V, p. 150. M
- (h) But the trustee can maintain an action for a declaration of his right, where though no call has been made, and though his name has not been placed on the list of contributories, the liquidator has asserted an intention to make the trustee liable, and the *cestui que trust*, has denied his right to indemnity. *Hobbs v. Wayet*, 36 Ch.D. 256. N

(12) Quantum of indemnity.

The trustee can compel the *cestui que trust* to pay in full all calls that be made upon the trustee, and the Company has the right to make the trustee pay all he can. “That which the Company can get, is measured, by the depth of the pockets of the *cestui que trust*, not only by that of the trustee.” Buckley, 9th Ed., p. 79; *Cf. Lacey v. Hill*, *Crowley's claim*, 18 Eq., 182, 191. O

(13) Assignment of Right to Indemnity.

- (a) Though a *cestui que trust* cannot be made a contributory in respect of shares registered in the name of his trustee, still, the Company may become entitled to the trustee's right of indemnity against the *cestui que trust*, and by enforcing that right through the trustee, practically render the *cestui que trust* liable as a contributory. See *British Nation Association*, 8 Ch. Div. 708; *Hemming v. Maddick*, (1871) W.N. 198 = 25 L.T. 482 = 7 Ch. 395; *James v. May*, 6 H.L. 323; *Heritage v. Paine*, 2 Ch. D. 594. P
- (b) Thus, a trustee who is placed on the list of contributories, may enter into an agreement with the liquidator as to his liability and as part of the same arrangement assign to the liquidator the benefit of his right of action for indemnity against the *cestui que trust*. *Hemming v. Maddick*, 7 Ch. 395; *Cruise v. Paine*, 6 Eq. 641; *Heritage v. Paine*, 2 Ch.D. 594; *National Financial Co.*, 3 Ch.D. 791; *British Nation Association*, 8 C.D. 679; *Massey v. Allen*, 9 C.D. 164; *James v. May*, L.R., 6 H.L. 323; *Butler v. Cumpston*, 7 Eq. 16; *Chapman and Barker's case*, 3 Eq. 361. Q
- (c) “But, in the absence of such arrangement, the Company cannot enforce the indemnity unless there is a special trust fund devoted to meeting the liability on the shares.” Emden's Winding up of Companies, 8th Ed., p. 204; see, also, *Lindley on Partnership*, 6th Ed., p. 628. R

I.—“No notice....Registrar ”—(Concluded).

(14) Title of *cestui que trust* when prevails.

- (a) The title of the *cestui que trust* is ignored only as between himself, the trustee and the Company; but as between the trustee, the *cestui que trust* and third parties, the equitable title of the *cestui que trust* will be duly recognized. See *Shropshire Union Railway v. The Queen*, L.R., 7 H.L. 496; *Great Eastern Railway Co. v. Turner*, 8 Ch. 149. S
- (b) Where a Railway Company having no power to purchase or hold shares in another Company, purchased some shares in another Company in the name of a trustee, and the trustee became a bankrupt, it was held, that although the purchase of the shares was illegal the Company as *cestui que trust* were entitled to the value bought with their money, and that the shares could not go to the trustee's assignees in the bankruptcy. *Great Eastern Railway Co. v. Turner*, 8 Ch. 149. T
- (c) It is the duty of those dealing with persons having an apparent legal title to the shares to enquire into the real position of affairs. *Shropshire Union Railway Co. v. The Queen*, (1875) 7 H.L. 496. U

54. A certificate under the common seal of the Company, specifying any shares or stock held by any member of a Company¹, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified².

Certificate
shares or stock.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 23 of the English Companies (Consolidation) Act of 1908.

I.—“A certificate....Company.”

(1) Member's right to demand share certificate.

- (a) The Act is silent as to a member's right to require a share certificate from the company. But the regulations of the company may provide for this. See Sch. I, Table A., Art. 2, *infra*. See, also, Russell & Bayley, 3rd Ed., p. 70. Y
- (b) Under S. 92 of the English Companies (Consolidation) Act 1908, every company shall, within two months after the allotment of any of its shares, debentures, or debenture-stock, and within two months after the registration of the transfer of any such shares, debentures or debenture-stock, complete and have ready for delivery the certificates of all shares, debentures or debenture-stock, allotted or transferred, unless the conditions of issue of the shares, debentures, or debenture-stock otherwise provide. W
- (c) A person cannot insist on having a certificate of shares, until he has done every thing necessary to make him a share-holder. *Wilkinson v. Anglo-Californian Gold Co.*, (1852) 18 Q.B. 728. X

I.—“A certificate....Company”—(Continued).

(2) Share certificate—Significance and effect of.

(a) A share certificate is a solemn affirmation under the seal of the company, and declares “to all the world that the person in whose name the certificate is made out and to whom it is given is the registered shareholder of certain shares or stock in the company and it is given by the company with the intention that it shall be so used by the person to whom it is given. *Re Bahia and San Francisco Railway Co.*, L.R. 3 Q.B. 584; *Shropshire Union Railways and Colonial Co v. The Queen*, (1875) L.R. 7 H.L. 496; *Balkis Co. v. Tomkinson*, (1893) A.C. 369. See, also, Halsbury's Laws of England, Vol. V, p. 182; Buckley, 9th Ed., p. 42. Y

(b) It also amounts to a declaration that the shares to which it relates are paid to the extent therein mentioned. *Bloomenthal v. Ford*, (1897) A.C. 156; *Burkinshaw v. Nicoles*, (1878) 3 App. Cas. 1004; *Barrow's case*, (1879) 14 Ch. D. 432 (C.A.); *Watershouse v. Jamieson*, (1870) L. R. 2, C. 29. Z

(c) It is not a negotiable instrument or a warranty of title on the part of the company issuing it. *Longman v. Bath Electric Tramways*, (1905) 1 Ch. 646. A

N.B.—Scrip certificates for shares are by mercantile usage negotiable instruments. “*Rumball v. Metropolitan Bank*, 2 Q.B. Div. 194, cited in Russell & Bayley, 3rd Ed., p. 70. See, also, *Goodwin v. Roberts*, L.R., 10 Ex. 76, 387=1 A. C. 476.

N.B.—To find out the effect of share certificate, the Act and the articles of association should be taken together. The section provides that certificates of shares are *prima facie* evidence of title, and if the regulations provide that they are the only instruments and evidence of title which the member is to have delivered to him, the certificate is the title-deed of the share-holder. *Societe Generale de Paris v. Walker*, (1885) 11 A.C. at p. 44; Cf. *Longman v. Bath Trawways*, (1905) 1 Ch. 646.

(3) Object of granting share certificates.

“The power of granting certificates is to give share-holders the opportunity of more easily dealing with the shares in the market, and to afford facilities to them of selling their shares by at once showing a market title: and the effect of this facility is to make the shares of greater value. The power of giving certificates, is therefore for the benefit of the company in general.” *Per Cockburn, C.J. in re Bahia, etc. Ry. Co.*, L.R. 3 Q.B. 595. B

(4) Company, when estopped by the issue of certificate.

(a) A Company is estopped from denying the truth of the statements in the certificate, as against a person who relying on the certificate, and not knowing that the statements in it were untrue, has acted or refrained from acting and has thereby suffered loss. *Balkis Consolidated Co. v. Tomkinson*, (1893) A.C. 396; *Bloomenthal v. Ford*, (1897) A.C. 156; *Dixon v. Kennaway & Co.*, (1900) 1 Ch. 833; *Farury's case*, (1896) 1 Ch. 100; *Barrow's case*, (1879) 14 Ch. D. 432, C. A.; *Burkinshaw v. Nicolls*, (1878) 3 App. Cas. 1004; *Ottos Kopje Diamond Mines Ltd.*, (1893) 1 Ch. 6, 18 C. A.; *Shaw v. Port Philip Gold Mining*

1.—“A Certificate....Company”—(Continued).

(1884) 13 Q.B.D. 103; *Monarch Motor Car Co. v. Pease*, (1903) 19 T.L.R. 148. Compare *Simson v. Anglo American Telegraph Co.*, *Anglo American Telegraph Co. v. Spurling*, (1879) 5 Q.B.D. 188 C.A.; *Re Railway Time Tables Publishing Co.*, *Ex parte, Sandys*, (1899) 42 Ch. D. 98, C.A.; *Re London Celluloid Co.*, (1898) 39 Ch. D. 190, C.A.; *Murkham and Darter's case*, (1899) 1 Ch. 414; *Re Newport and South Wales Ship owner's Co.*, *Roland's case*, (1880) W.N. 80, C.A., cited in *Halsbury's Laws of England*, Vol V. pp. 182, 183. C

(b) Thus, as against a person, who has purchased shares on the faith of the statement in the certificate, the Company is estopped from denying that the person to whom the certificate is granted is the registered holder entitled to the specific shares comprised in the certificate. *Bahia and San Francisco Railway Co.*, (1868) L.R., 3 Q.B. 584. D

(c) When the certificate has come into the hands of a person as against whom the Company is estopped from denying the statement, therein, he can give a good title to a transferee, even though he had notice of the falsehood of the statements therein. *Barrow's case*, (1879) 14 Ch. D. 432, C.A. E

(d) If the certificate states that the shares are fully paid up, the Company is estopped as against a purchaser for value without notice to the contrary, from denying that they are so paid up. *Burkinshaw v. Nichols*, (1878) 3 A.C. 1004; see, also, *Bloomenthal v. Ford*, (1897) A.C. 156. F

(e) Moreover, if a person lends money to a Company on condition that he should have fully paid up shares or security, and a certificate for fully paid up shares is issued, and the shares are allotted and registered in his name, the company is estopped from asserting against him any liability in respect of them. *Bloomenthal v. Ford*, (1897) A.C. 156. G

N.B.—“This case, and *Parbury's case*, (1896 1 Ch. 100), extend the doctrine of *Burkinshaw v. Nichols*, (1879) 3 App. Cas. 1004, which was that of a transferee to the case of an original allottee.” See *Halsbury's Laws of England*, Vol. V, p. 183, Foot-note (O).

(f) The Company is likewise estopped against a vendor of shares who having *bona fide* purchased the same, enters into contracts for their sale relying on the statements contained in the certificate issued to him. *Balkis Co. v. Tomkinson*, (1891) 2 Q.B. 614 = (1893) A.C. 396. H

(g) Thus, where A transferred shares to B, and after the transfer was registered, A fraudulently transferred the same shares to C, and the company gave C a certificate, though he was not put on the register, held, company was estopped from denying C's right to transfer. *Balkis Co. v. Tomkinson*, (1891) 2 Q.B. 614 = (1893) A.C. 396. I

N.B.—The test is whether the shares were taken honestly on the faith of the certificate, and if so, whether the holder afterwards honestly acted on the certificate, or relied on it to his detriment. *Hart v. Frontino etc.*, *Gold Mining Co.*, (1870) L.R., 5 Exch. 111; *Dixon v. Kennaway & Co.*, (1900) 1 Ch. 883.

N.B.—But, the company is not estopped against a purchaser who was in no way led to alter his position by the certificate, or who obtained a certificate from the company by producing an invalid transfer.

I.—“A Certificate....Company”—(Continued).

Simla v. Anglo-American Telegraph Co., Anglo-American Telegraph Co. v. Sparling, (1879) 5 Q.B.D. 188, C.A. : *Dixon v. Kennaway and Co.*, (1900) 1 Ch. 833.

- (h) Thus, a person who claims under a transfer to which the name of the registered share-holder is forged, gets no title to the shares and the transferee does not acquire any rights by the simple fact that the company has issued to him a certificate that he is the holder of the shares which the transfer purports to assign. *Sim v. Anglo American Telegraph Co.*, (1879) 5 Q.B.D. 188. J

- (i) On the other hand, the transferee who deposits a transfer with the company will have to indemnify the Company for any loss it may suffer in consequence of the transfer being a forgery. *Sheffield Corporation v. Barelay*, (1905) App. Cas. 392. K

- (j) But, a purchaser under a forged transfer can sue the company for damages if he can show that he bought the shares in good faith, and by relying on the certificate believed that he had a good title and thereby allowed his claim against his vendor for repayment of the purchase-money to be lost, unless the company can prove (the *onus* being on the company) that, at the time of the purchase, the purchaser could not have recovered anything from his vendor. *Dixon v. Kennaway and Co.*, (1900) 1 Ch. 833. L

- (k) The holder of a forged certificate is not entitled to any rights against the company though the forgery is the Act of one of the secretaries of the company. *Ruben v. Great Fingall, consolidated*, (1904) 2 K.B. 712 = (1906) App. Cas. 489. M

N.B.—Buckley is of opinion that the decision in *Shaw v. Port Philip Co.*, (18 Q.B.D 103), in which the company was held to be estopped by a certificate issued by a fraud of its secretary, and which was in fact a forgery, upon the principle that the company was responsible for the fraud of its agent acting within the scope of his employment, cannot be substained and that the case misapplied the principle of *Barwick v. English Joint Stock Bank*, (L.R. 2 Ex. 259), for, the secretary was clearly not acting for the benefit, *i.e.*, for or on behalf of the company, but for his own interest and in such case the Company is not, in an action for deceit, liable for fraud of its agent. See Buckley, 9th Ed. p. 43.

- (l) But the company may possibly be stopped by a certificate issued under the authority of its directors, even if such authority had been obtained by the fraud of the secretary. See *Dixon v. Kennaway*, (1900) 1 Ch. 833, cited in Buckley, p. 43. N

- (m) A Director is not estopped from denying the validity of a certificate by the mere fact that he was present at the meeting in which the certificate was passed. (*Ibid.*) O

- (Quære).—Whether the Company will not be estopped if the Director has actually signed the certificate. (*Ibid.*) P

- (n) The mere fact that the Company has paid dividends to a purchaser of shares does not estop it from denying his title to the shares. *Foster v. Tyne Pontoon and Dry Locks Co.*, (1898) 63 L.J., (Q.B.) 50. Q

1.—“A certificate....Company”—(Concluded).

(5) Damages for refusal to register a transfer.

- (a) The share certificate is not a warranty of title upon which the transferee who has paid the purchase-money can sue the Company. It only operates as an estoppel, which does not in itself give rise to a cause of action. It is only when the Company has done something which it ought not, or has omitted to do something which it ought not to have done upon the assumed state of facts which the Company is estopped from denying, that the action for damages lies. *Buckley*, 9th Ed., p. 44. R
- (b) If a person has in good faith purchased shares relying on the certificate issued by the Company to the transferor, and the Company refuses to register the transfer on the ground that the transferor had obtained the certificate by fraud, the refusal to register is a cause of action, and the transferee is entitled to recover damages from the company, and the measure of the damages is the value of the shares on the date of the Company's refusal to register. *Ottos Kopje Mines*, (1893) 1 Ch. 618. S
- (c) It is only the person who has been induced by the statements in the certificate, and is therefore entitled to estoppel that can claim damages against the Company. *Simm v. Anglo-American Telegraph Co.*, 5 Q.B.D. 188. T

(6) Measure of damages, how determined.

- (a) The measure of damages to which a purchaser of shares is entitled, in consequence of the Company's refusal to register the transfer, is the value of the shares on the date of the refusal, and is not necessarily their value at the date at which the transferee bought. *Buckley*, 9th Ed., p. 44. U
- (b) The directors are not bound to register a transfer immediately it is lodged for registration, but are entitled to a reasonable time after the lodgment of the transfer, and if on the expiry of the reasonable time, they refuse to register, the date will be the date of refusal, and not the date of lodgment, or the earlier date of transfer. *Ottos Kopje Mines*, (1893) 1 Ch. 618. Y
- (c) If immediately on lodgment the directors refuse, that will be the date. (*Ibid.*) W

2.—“Shall be prima facie evidence....specified.”

(1) Evidentiary value of share certificate.

The certificate is the only documentary evidence of title in the possession of a share-holder. *Societe Generale de Paris v. Walker*, (1885) 11 App. Cas. 20, 29; cited in *Halsbury's Laws of England*, Vol. V. p. 182. X

(2) Share certificate, evidence only of legal title.

- (a) A share certificate is evidence only of legal title and not of equitable title to the shares. *Shropshire Union Railways and Canal Co. v. R.*, (1875) L.R., 7 H.L. 496, 509. Y

2.—“*Shall be prima facie evidence . . . specified*”—(Continued).

- (b) “The certificate purports to show the legal, not the equitable title; if persons are content to deal on the faith of the certificate with the registered share-holder without enquiring into the beneficial ownership and without obtaining a legal title by transfer, they may find themselves ousted by an earlier equitable title or by a legal title,” Buckley, 9th Ed., p. 45. Z
- (c) Thus, if a share-holder who is a trustee for the Company, mortgages the shares to some person by depositing the share certificate, the title of the mortgagee will not prevail against the prior equitable title of the Company. *Shropshire Union Railways v. The Queen*, L.R., 7 H.L. 496. A
- (d) Similarly, where the executrix of a deceased share-holder transferred shares to a *bona fide* purchaser for value and registered the shares in the name of the transferee, the title of the transferee prevailed over that of the assignee of the deceased who held only the certificate. *London and Provincial Telegraph Co.*, 9 Eq. 653. B
- (e) And an inchoate legal title acquired by delivery of share certificates, is liable to be defeated by a complete legal title acquired by a registered transfer by a *bona fide* purchaser for value. *Colonial Bank v. Hepworth*, 36 Ch. D. 36. C
- (3) **Legal title to shares, when passes.**
- (a) It is difficult to say at what moment the legal title to shares passes upon a transfer. A transfer duly executed and registered will, of course, pass the legal title to the transferee. But, mere registration, will not, in the absence of a duly executed transfers be sufficient. Sometimes, the transferee can get a legal title though the transfer has not been registered. See Buckley, 9th. Ed. p. 45. See, also, *Powell v. London and Provincial Bank*, (1893) 1 Ch. 611=2 Ch. 555. D
- (b) Thus, a transferee may acquire a legal title to the shares as soon as all necessary conditions have been satisfied, to give the transferee as between himself and the Company a present absolute and unconditional right to have the transfer registered. *Nanny v. Morgan*, 37 Ch. Div. 346; *Roots v. Williamson*, 38 Ch. D. 485; *Moore v. North-Western Bank*, (1891) 2 Ch. 599; *Ireland v. Hart*, (1902) 1 Ch. 522; *Peat v. Claytor*, (1906) 1 Ch. 659. E
- (c) A Company is not bound to register a transfer immediately it is lodged for registration, but is entitled to take a reasonable time for making enquiries, and if before the expiration of such reasonable time the company receive notice of a prior equitable title, it may refuse to register the transfer, so that, it would seem, that during this time legal title has not passed so as to exclude the prior equity. *Societe Generale v. Walker*, 11 A.C. 20; 208; *Roots v. Williamson*, 38 Ch. D. 485, 493; see, also, *Moore v. North Western Bank*, (1891) 2 Ch. 599. F
- (d) If, however, the transfer is registered without notice of the prior equity, the legal title may enure for the benefit of the registered holder. *Dodds v. Hills*, 2 H. & M. 424. G
- (4) **Equitable title—Instances of.**
- (a) Where a transfer is required to be by deed, a transfer in blank will only pass an equitable title and will not prevail over a prior equity. *Powell v. London and Provincial Bank*, (1893) 2 Ch. 555. H

2.—“*Shall be prima facie evidence....specified*”—(Concluded).

N.B.—But, where the regulations do not require a deed, a transfer in blank will pass the legal title to the person with whose name the blank is eventually filled by the holder of the transfer. *E.P. Sargent*, 17 Eq. 273; explained in *France v. Clark*, 26 Ch. Div. 257; *Tees Bottle Co., Davies*¹, case, 33 L.T. 884.

N.B.—For blank transfers, see further, notes under S. 44, *supra*.

- (b) If the articles require that every transfer should be executed by both the transferor and the transferee, a transfer executed by the transferor alone does not pass the legal title. *Ortigosa v. Brown, Janson & Co.*, 38 L.J. 145. I

“Miscellaneous.”

(1) ‘Certification of transfers.’

- (a) “Where a share-holder sells some only of the shares comprised in one certificate or sells some to one person and the rest to another, he leaves the certificate with the Company, whose Officer, generally the Secretary, notifies in the transfer or transfers that the certificate has been lodged.” This practice is called “certification of transfers.” J

See Halsbury's Laws of England, Vol. V, pp. 193, 194.

- (b) “Thus A has 100 shares and wishes to sell 50 to B; A hands his certificate and transfer to the Company. The Company stamps on the transfer “certificate for 100 shares has been lodged at the Company's Office, (Signed) —, Secretary.” The Company is said to “certify the transfer.” The Company then prepares two new certificates for fifty shares each and gives one to A and one to B. See *Topham*, 2nd Ed., p. 102. K

- (c) A certification of transfer means no more than that certain documents apparently in order and showing *prima facie* that the transferor is entitled to the shares, have been lodged with the Company. It does not amount, to a warranty of the transferor's title, or of the validity of the documents. *Longman v. Bath Tramways*, (1905) 1 Ch. 646; see, also, *Bishop v. Balkis Consolidated Co.*, (1895) 2 Q.B.D. 512, 519, 520, C.A. L

- (d) The Company, is not under an obligation to preserve the original certificate, and if after the certification of a transfer, the Company sends the original certificate by mistake, to the transferor, and the transferor makes a fraudulent use of it, the Company incurs no liability to the person claiming under the fraudulent act of the transferor. *Longman v. Bath Electric Tramways Limited*, (1905) 1 Ch. 646. M

- (e) Where transfers of shares were lodged with the Secretary of a Company without the certificates, but the Secretary fraudulently certified upon a transfer that certificates had been lodged at the Company's Office, the Company was not estopped from setting up the true facts. *Whitechurch v. Cavanagh*, (1902) A.C. 117. N

(2) Stamp on share certificate.

- (a) In India a certificate of shares, scrip or stock in an incorporated Company or other body corporate requires a stamp of one anna. See Sch. I, Art. 19 of the Indian Stamp Act (II of 1899). O
- (b) In England, a share certificate requires no stamp, but a scrip certificate requires a penny stamp. *R. v. Morton*, (1873) L.R., 2 C.C.R. 22. P

Miscellaneous—(Concluded).

(3) Lien not to be entered on share certificate.

The Company must not enter on the share certificate any memorandum that it has a lien on the shares. *W. Key & Son*, (1902) 1 Ch. 467. Q

(4) Note on certificate for its production before registering transfer—Effect of.

"The usual note on the certificate that without its production, no transfer will be registered, is a mere warning to take care of it, and is not an invitation to all the world to deal with the certificate on the footing of a contract with the holder for the time being not to allow a transfer to be registered without its production." *Rainford v. Kaith (James) and Blackman Co., Ltd.*, (1905) 1 Ch. 296; *per Fairwell, J., reversed on another ground*; *Guy v. Waterlow Brothers & Layton, Ltd.*, (1909) 25 T.L.R. 515; compare *Societe Generale De Paris v. Walker*, (1885) 11 App. Cas. 20; cited in Halsbury's Laws of England, p. 184. R

55. The register of members, commencing from the date of the registration of the Company, shall be kept at the registered office of the Company hereinafter mentioned. Except when closed as hereinafter mentioned, it shall, during business hours, but subject to such reasonable restrictions as the Company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one rupee, or such less sum as the Company may prescribe, for each inspection ¹.

Every such member or other person may require a copy of such register, or of any part thereof ², or of such list or summary of members as is hereinbefore mentioned, on payment of two annas for every hundred words required to be copied.

If such inspection or copy is refused, the Company shall incur for each refusal a penalty not exceeding fifty rupees, and a further penalty not exceeding twenty rupees for every day during which such refusal continues.

Every director and manager of the Company who knowingly authorises or permits such refusal shall incur the like penalty.

In addition to the above penalty any Judge of a High Court may, by order, compel an immediate inspection of the register.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 30 of the English Companies (Consolidation) Act of 1908.

General—(Concluded).

(2) Object of the section.

The section was introduced into the Act not only for the protection of shareholders, but also for the protection of the public. 20 A. 126. S-1

(3) Section inapplicable to Companies in liquidation.

The provisions of this section apply to a company only so long as it is a going concern. The right to inspect and require copies, conferred by this section ceases when the company is in liquidation. *Kent Coal Fields Syndicate*, (1898) 1 Q.B. 755. T

(4) Inspection after winding-up.

(a) If inspection is required after the commencement of winding-up by or subject to the supervision of the Court, an order of the Court must be obtained under S. 200, *infra*. The Court can under that section permit inspection only to creditors and contributories of the company, and if an order is obtained the inspection can be made only in conformity with the order. See *Somerset v. Land Securities Co.*, (1897) W.N. 29. U

(b) An order of the Court under that section entitles the party to inspect and take copies without paying. He is not bound to require the liquidator to furnish him with copies and pay the liquidator for them. *Ra Arauco Co.*, (1899) W.N. 134. Y

1.—“Except....inspection.”

(1) Right of inspection under section, absolute.

Where a person who is entitled under this section to obtain inspection of the register of shareholders applies for inspection during business hours and not at a time when inspection is prohibited either under S. 56 or by reason of any rules framed by the company under this section, such inspection must be granted, and even a temporary refusal based upon grounds of convenience to the company's business, will render a director or responsible for such refusal, liable to the penalty provided by this section. 20 A. 126. W

(2) Applicant need not state his object.

A member who applies for inspection need not state the object for which he wants it. *Holland v. Dickson*, 37 Ch. D. 669; *Davies v. Gas Light Co.*, (1909) 1 Ch. 248. X

(3) Motive of the applicant, immaterial.

(a) Even if it be known that the object of inspecting the register or of requiring a copy thereof is antagonistic to the company it is illegal to refuse such inspection or copy. *Reg. v. Wills and Berks Canal Navigation Co.*, (1873) 29 L.T. 922; see, also, *Mutter v. Eastern and Midlands Railway*, (1888) 38 Ch. D. 92; *Davies v. Gas Light and Coke Co.*, (1909) 1 Ch. 248, *affirmed* in (1909) W.N. 77, *cited* in *Gore-Browne and Jordon*, 80th Ed., p. 62. Y

(b) Hence a company cannot refuse a shareholder inspection of the register of members on the ground that he is the solicitor of parties engaged in litigation against the company, and that the inspection is required in the interest of his client and not in the interest of the company or any member of the company as such. *Reg. v. Wills Navigation*, 29 L.T. 922, *cited* in *Buckley on Companies*, 9th Ed., p. 83. Z

1.—“*Except...inspection*”—(Concluded).

(4) Presidency Banks—Right of inspection.

(a) This section is inapplicable to the Bank of Madras, Bombay or Bengal, all of which are incorporated by the Presidency Banks Act (XI of 1876). A shareholder of one of such Banks cannot claim an absolute right of inspection which the present section confers on a member of a company registered under this Act. A member of such Bank has no statutory right to inspect, copy or take entries from the register of its shareholders, or any other document belonging to it. In respect to such matters he has only the Common Law right belonging to every member of a corporation, and his right of inspection is limited to cases where he has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object. 12 C.W.N. 825. A

(b) Where, therefore, it appeared that a member of such Bank had no special interest in any of the matters complained of, or any interest other than or different from that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate, but his object was to obtain inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the Bank's affairs, *held* that he was not entitled to the right of inspection. (*Ibid.*) B

2.—“*Every such member.....part thereof.*”

(1) Right to take copies, under the Companies Clauses Acts.

Under the English Companies Clauses Acts there is a right to take copies but under the present section, while the person entitled to inspect can require a copy on payment of the prescribed fee, he is not entitled to take a copy himself. *Balaghat Co.*, (1901) 2 K.B. 665, *overruling Board v. African Consolidated Co.*, (1898) 1 Ch. 596. C

(2) Lien cannot be created over Register.

(a) As persons other than the company have rights under this section over the register of members, the directors cannot deal with it so as to create a lien over it. *Capital Fire Association*, 24 Ch. D. 408. See, also, *Rapid Transit Co.*, (1909) 1 Ch. 96. D

(b) Hence the solicitor to a company cannot acquire a lien over the register of members. *Capital Fire Association*, 24 Ch. D. 408; *Rapid Transit Co.*, (1909) 1 Ch. 96. E

N.B.—The same rule may hold good with regard to other books which under the Act or the Articles of Association are required to be kept at the registered office of the Company. *Anglo-Maltese Hydraulic Dock Co.*, (1885) 54 L.J. Ch. 730.

(3) Right to custody of register in winding-up.

As between a receiver for debenture-holders, and a liquidator in a compulsory winding-up, the latter is entitled to the custody of such of the books (including the register of members) and documents of the Company as relate to its management and business, and are not necessary to support the title of the debenture-holders. *Eugil v. South Metropolitan Brewing Co.*, (1892) 1 Ch. 442. F

56. Any Company under this Act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the Company is situate and in the local official Gazette, close the register of members for any time or times not exceeding in the whole thirty days in each year.

Power to close register.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 31 of the English Companies (Consolidation) Act of 1908.

(2) Company not bound to register transfer when register is closed.

The Bank of Bengal was held entitled to refuse to register a transfer of shares when the application was made during the time the transfer books of the Bank were closed under the powers given by S. 21 of Act XI of 1876 and after a public notification in accordance therewith.
3 C. 392. G

N.B.—Though the Bank might not have given this reason for not registering at the time of the application being made, they were entitled to avail themselves of it subsequently when a suit was brought to compel them to register the transfer. (*Ibid.*)

57. Where a Company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and, where a Company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the Registrar, in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorised, and in the case of an increase of members, within fifteen days from the time at which such increase of members has been resolved on or has taken place; and the Registrar shall forthwith record the amount of such increase of capital or members.

Notice of increase of capital and of members to be given to Registrar.

If such notice is not given within the period aforesaid, the Company in default shall incur a penalty¹ not exceeding one hundred rupees for every day during which such neglect to give notice continues; and every director and manager of the Company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

(Notes).
General.

Corresponding English Law.

This section corresponds to S. 44 of the English Companies (Consolidation) Act of 1908. The words "or in the case of a special resolution the confirmation" which are found in the English Act, between the words "in the case of an increase of share capital within fifteen days after the passing" and the words "of the resolution authorizing the increase" are not found in the Indian Act.

Under the English Act the penalty for default is £5 for every day.

1.—"The Company in default shall incur a penalty."

Prosecution under the section—Limitation.

No period of limitation is fixed for the prosecution of an offence under this section. Imperial Cotton Mills Co.'s case, decided by the Chief Presidency Magistrate of Bombay, reported in the Times of India, 3rd December, 1885, and cited in Russell and Bayley, 3rd Ed., p. 73. G-1

58. If the name of any person is fraudulently or without sufficient cause¹ entered in, or omitted from, the register of members kept by any Company under this Act, or if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the Company², the person or member aggrieved, or any member of the Company, or the Company itself, may, by application to the principal Court of original civil jurisdiction in the district or place in which the registered office of the Company is situate, apply for an order of the Court that the register may be rectified³; and the Court may either refuse such application, with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the Company to pay all the costs of such application, and any damages the party aggrieved may have sustained⁴.

The Court may in any proceeding under this section decide any question relating to the title of any person who is a party to such proceeding to have his name entered in, or omitted from, the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the Company, and whether there has or has not been default on the part of the Company; and generally the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register: Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal in the manner directed by the Code of Civil Procedure shall lie⁵.

Remedy for improper entry or omission of entry in register.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 32, sub-secs. 1, 2 and 3 of the English Companies (Consolidation) Act, 1908. The word 'fraudulently' found before the words, 'or without sufficient cause' is not found in the English Act. The other differences in wording between the two sections relate to the Courts in which, and the modes by which, application is to be made under the sections. The proviso in S. 58 of the Indian Act which gives power to Court 'to direct an issue to be tried in which any question of law may be raised' is not to be found in S. 32 of the English Act, 1908. H

(2) Jurisdiction under the section.

(a) The jurisdiction to rectify the register, conferred by this section can be exercised only in two cases: (1) if the name of a person is without sufficient cause entered in or omitted from the register and (2) if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member. *E.P. Ward*, L.R. 3 Ex. 180. I

(b) When there is no dispute as to a person being, or having ceased to be a member, the summary jurisdiction under this section to compel the company to perform the ministerial duty of entering the fact on the register is clear. See *Buckley on Companies*, 9th Ed., p. 85. J

(c) Similarly the Court can rectify the register under the section if the company has prematurely registered a member, e.g., before a contract under S. 28, *supra*, has been filed. *Denton Colliery Co., E.P. Shaw*, 18 Eq. 16. K

N.B.—To give jurisdiction under the section it is not necessary that there should have been default on the part of the company. If in deciding the question of legal title it appears that the right name has not been registered, there is jurisdiction. *E.P. Shaw*, 2 Q.B.D. 463.

(3) Cases of conflict of equities—Jurisdiction.

When there are equities to be determined the cases are divisible into two classes, (1) where the contest is between alleged share-holders and the company and (2) where it is between two persons each claiming to be a member. *Buckley on Companies*, 9th Ed., p. 85. L

(4) Conflict between member and company.

(a) There are numerous English cases in which S. 32 of the English Companies Act (1908) corresponding to the present section has been resorted to, for determining the equities between an alleged share-holder and the company. See *Stewart's case*, 1 Ch. 574, and the cases there cited. M

(b) If the share-holder clearly establishes his right, the Court will proceed under this section, and will not put the member to the necessity of bringing an action. *E.P. Ward*, L.R. 3 Ex. 180, 184; *E.P. Shaw*, 2 Q.B.D. 463. N

(5) Conflict between member and member.

It is doubtful whether the summary jurisdiction under the section exists in a case of conflict of equities between members or alleged members themselves. There is a conflict of opinions on this point in cases

General—(Continued).

decided under the English Law. See *Ward and Henry's case*, 2 Ch. 431; *Reese River Co. v. Smith*, L.R. 4 H.L. 64, 80; *E.P. Sargent*, 17 Eq. 273, 276; *Stewart's case*, 1 Ch. 574, 585; *Ward's case*, 2 Eq. 226; *Head's case*, 3 Eq. 84; *Ward and Garjit's case*, 4 Eq. 189; *Musgrave and Hart's case*, 5 Eq. 193. O

N.B.—It is however clear, that in a conflict of equities between two claimants, the jurisdiction, if it exists, will not be exercised in a complicated and difficult case. *Stewart's case*, 1 Ch. 585, 586; *Ward and Henry's case*, 2 Ch. 431; *E.P. Kintrea*, 5 Ch. 95, 99.

(6) **Contest between claimants—Legal right established in one of them—Jurisdiction.**

Where there is no conflict of equities, but one of the claimants establishes a clear legal right, rectification will follow. *Exp. Sargent*, 17 Eq. 273; *Exp. Shaw*, 2 Q.B.D. 463. P

(7) **Rectification in spite of forfeiture.**

A person whose name has been improperly registered as a member can apply to have his name removed from the register, though the shares in respect of which he was registered as a member have been forfeited, and the fact has been noted in the register. *Los. case*, 34 L.J. (Ch.) 609 = 13 W.R. 883 = 12 L.T. 690 = 11 Jur. (N.S.) 661. Q

(8) **Effect of order of removal, on the member's liability.**

The order of a Court removing the name of a person from the register is as against the company and other members a complete indemnity to that person. *Bank of Hindustan, China and Japan, Martin's case*, 2 H. & M. 669. R

(9) **Rectification—Retrospective effect of.**

A rectification may sometimes have a retrospective effect so as for instance to give validity to an act done before rectification by a person whose name is subsequent to the rectification entered on the register. *Sussex Brick Co.*, (1904) 1 Ch. 598; see, also, *Re Scottish Universal Finance Bank, Breckenridge's case*, (1865), 2 Hem. & M. 642; *Baillie's case*, (1898) 1 Ch. 110. S

(10) **Jurisdiction to rectify—Discretionary.**

(a) The power of rectifying the register given by the section is discretionary in the sense—that the Court properly can only exercise it if satisfied of the justice of the case. The Court may decline to exercise this power, if it is not fair to do so, i.e., if the applicant has not established any equity to disturb the existing state of things. See *per Kekewich, J.*, in *Bellerby v. Rowland etc., Steamship Co.*, (1901) 2 Ch. at p. 273. See, also, *Ex parte Shaw*, (1877) 2 Q.B.D. 468 C.A., *Re Kimberley North Block Diamond Co., Ex parte Wernher*, (1888), 59 L.T. 579 C.A.; *Ward and Henry's case*, (1867), 2 Ch. App. 431, 441; *Re Tahiti Cotton Co., Ex parte Sargent*, (1874) L.R. 17 Eq. 273, 276, cited in Halsbury, Vol. V, p. 154. T

(b) The section does not give a member or alleged member *ex debito justitiae*, the summary remedy. *Re British Sugar Refining Co.*, 3 K. & J. 408. U

General—(Continued).

(11) Jurisdiction, when may be refused to be exercised.

- (a) If, from its complexity or otherwise, the Court thinks that any case could be more satisfactorily dealt with in an action, the Court, without prejudice to the applicant's right to institute an action for rectification, will decline to make an order. *Re National and Provincial Marine Insurance Co., Ex parte Parker*, (1867) 2 Ch. App. 685; *Simpson's case*, (1869) L.R. 9 Eq. 91; *Stewart's case*, (1866) 1 Ch. App. 574, 585; *Re Gresham Life Assurance Society, Ex parte Penny*, (1872) 8 Ch. App. 446, 448; *Askew's case*, 9 Ch. App. 664; *Re Bagnall & Co., Ex parte Dick*, (1875) 32 L.T. 536; *Bellerby v. Rowland*, (1901) 2 Ch. 265 = (1902) 2 Ch. 14; *E.P. Shaw*, 2 Q.B.D. 463; *Ward and Henry's case*, 2 Ch. 431. See Halsbury's Laws of England, Vol. V, p. 154. Buckley, 9th Ed., p. 85. Y
- (b) Thus the Court may decline to pass an order on the application of a paid-up share-holder, for such share-holder is under no liability, and the order to remove his name amounts to a decision that he is entitled to repayment. *Alison's case*, 15 Eq. 394 = 9 Ch. 1. W
- (c) Similarly the Court will not order a transfer to be registered where the alleged transferor is not before the Court and there is any real doubt as to the validity or *bona fides* of the transaction. 8 C. 317. X

(12) Court's duty when it exercises jurisdiction to rectify.

When the Court entertains the application, it is bound to go into all the circumstances of the case, and to consider what equity the applicant has to call for its interposition. *Trevor v. Whitworth*, (1887) 12 App. Cas. 409, 440; *Sichell's case*, (1867) 3 Ch. App. 119; *Bellerby v. Rowland and Marwoods Steamship Co. Ltd.*, (1902) 2 Ch. 14 C.A. cited in Halsbury, Vol. V, p. 154. Y

N.B.—The words "if satisfied of the justice of the case" which were also found in the corresponding section of the English Companies Act, 1862, S. 35, are not re-enacted in the English Companies (Consolidation) Act of 1908.

N.B.—As to the importance of these words, see *per* Lord Macnaghten in *Trevor v. Whitworth*, 12 A.C. at p. 440.

(13) Cases in which the power of rectification has been exercised.

- (a) Where there has been misrepresentation in the prospectus, *Bwlch-y-plwm Lead Mining Co. v. Baynes*, (1887) L.R. 2 Exch. 324; *Beniley and Co. v. Black*, (1893) 9 T.L.R. 580 C.A.; *Deposit Life Assurance v. Ayscough*, (1856) 6 El. and Bl. 761; *Aaron's Reefs Twiss*, (1896) A.C. 278. Z
- (b) Where it is expedient to have an order which will bind all the share-holders and effectually bar any subsequent application for restoration of a name struck out by the directors. *Martin's case*, (1865) 2 Hem. & M. 669; *Higg's case*, (1865) 2 Hem. & M. 657; *Re Bank of Hindustan, China and Japan, Ex parte Los*, (1865) 34 L.J. (Ch.) 609. A
- (c) Where shares have been improperly issued at a discount. *Coregon Gold Mining Co. of India v. Royer*, (1892) A.C. 125; *Re Eddysone Marine Insurance Co.*, (1893) 3 Ch. 9 C.A.; *Hirsche v. Sims*, 189 A.C. 654, P.C.; *Re Addlestone Linoleum Co.*, (1887) 37 Ch. D. 191 C.A.; *Re*

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- Almada and Tiritó Co.*, (1888) 38 Ch. D. 415 C.A.; *Re New Chile Gold Mining Co.*, (1888) 38 Ch. D. 375; *Keatinge v. Consolidated Mines*, (1902) 18 T.L.R. 266. **B**
- (d) Where the application for shares has been made in the name of a person, as, for instance, an under-writer, without his authority. *Re Consort Deep Level Gold Mines, Ltd., Ex parte Stark*. (1897) 1 Ch. 575 C.A.; see, also, *Re Beniley (Henry) and Co. and Yorkshire Breweries, Ex parte Harrison*, (1893) 69 L.T. 204 C.A.; *Hindley's case*, (1896) 2 Ch. 121 C.A.; *Carmichael's case*, (1896) 2 Ch. 643. **C**
- (e) Where there is no valid allotment of shares, *Re Homer District Consolidated Gold Mines, Ex parte Smith*, (1888) 39 Ch. D. 546; *Re Portuguese Consolidated Copper Mines, Ltd.*, (1889) 42 Ch. D. 160 C.A.; *Re Printing, Telegraph and Construction Co. of Agence Havas, Ex parte Cammel*, (1894) 2 Ch. 392 C.A. **D**
- (f) Where the allotment is not made within a reasonable time, *Re Bowron, Baily and Co., Ex parte Baily*, (1868) 3 Ch. App. 592. **E**
- (g) Where an allotment has been irregularly made, *Re Homer District, Consolidated Gold Mines, Ex parte Smith* (1889), 39 Ch. D. 546. **F**
- (h) Where a transfer of shares has been improperly registered or refused registration, *Pulbrook v. Richmond Consolidated Mining Co.*, (1878) 9 Ch. D. 610; *Re Bahia and San Francisco Rail. Co.*, (1868) L.R. 3 Q.B. 584 (Forged transfer); *Re Stranton Iron and Steel Co.*, (1873) L.R. 16 Eq. 559 (Transfer for the purpose of increasing power to vote); *Re Manchester and Oldham Bank*, (1885) 54 L.J. (Ch.) 926; *Ex parte Shaw*, (1877) 2 Q.B.D. 463 (C.A.); *Re Stockton Malleable Iron Co.*, (1875) 2 Ch. D. 101; *Re Ystalyfera Gas Co.*, (1887) W.N. 30; *Re Violet Consolidated Gold Mining Co.*, 80 L.T. 684. **G**
- (i) Where the Company puts on its register matters which are not required by the Act, *Re Key (W) & Son., Ltd.*, (1902) 1 Ch. 467; *Re Saumder's & Co.*, (1908) 1 Ch. 415. **H**
- (j) Where it is sought to set right allotments of shares which have been issued as fully paid without a proper contract being filed, as required by S. 28, *supra*, *Re New Zealand Kapanga Gold Mining Co., Ex parte Shaw*, (1873) L.R. 18 Eq. 17 (v); *Re Denton Colliery Co., Ex parte Shaw*, (1874) L.R. 18 Eq. 16; *Re Broad street Station Dwellings Co.*, (1887) W.N. 149; *Re Nottingham Brewery*, (1888) 4 T.L.R. 429; *Re Maynards, Ltd.*, (1898) 1 Ch. 515; *Re Lovibond & Sons*, (1901) 17 T.L.R. 315; *Re Darlington Forge Co.*, (1887) 34 Ch. D. 522. **I**

(14) Suit for rectification.

- (a) The procedure prescribed by the section is a summary one and enables the Court to rectify the register on an application made for that purpose without any suit having been instituted. But, apart from the section, a suit may, without any direction by the Court, be brought for the rectification of the register. *Bloxam v. Metropolitan Cab & Carriage Co.*, (1864) 12 W.R. 736; *Roots v. Williamson*, (1888) 38 Ch. D. 485; *Moore v. N.W. Bank*, (1891) 2 Ch. 599; *Lynde v. Anglo Italian Hemp Spinning Co.*, (1896) 1 Ch. 178; *McKeown v. Boudard Feveril Gear Co.*, (1896) 74 L.T. 712 C.A. **J**

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- (b) To bring a suit is the proper course which should be followed where there is much complexity, or where other relief is required. See cases cited under 'jurisdiction, when may be refused to be exercised.'
No. 11, *supra*. K

(15) Application of the section to Companies in liquidation.

- (a) S. 32 of the English Companies (Consolidation) Act has been held applicable to Companies in liquidation as well as to going Companies. Although in the case of Companies in liquidation there is, under S. 163 of that Act (corresponding to S. 147 of the Indian Act) a separate power to rectify, it has been held that the power conferred by S. 32 is not determined or cut down by winding up, and may be exercised after as well as before winding up. See *Sussex Brick Co.*, (1904) 1 Ch. 598; *Breckenridge's case*, 2 H. & M. 642; *Reese River Mining Co. v. Smith*, 4 H.L. 64; *Onward Building Society*, (1891) 2 Q.B. 463; *Ward and Henry's case*, 2 Eq. 226 = 2 Ch. 431. L

- (b) The Allahabad High Court has held that S. 58 of the Indian Companies Act only gives authority to pass orders in a case where a Company is a going concern and that all applications made for rectification of the register after liquidation must be made under and by virtue of the authority conferred by S. 147. See 22 A. 510. M

N.B.—This decision must not be deemed to exclude the application of S. 58 to cases of Companies in liquidation. S. 147 expressly provides that the register may be rectified in all cases where rectification is required in pursuance of this section. The effect of the decision therefore seems to be that the provisions of S. 58 do not apply to a Company in liquidation of their own force but only in virtue of the power conferred by S. 147, and to that extent must be deemed to be part of S. 147.

N.B.—An application against a company in liquidation is a proceeding against the company within the meaning of S. 136, *infra*, and can be made only with the sanction of the Court under that section. *Onward Building Society*, (1891) 2 Q.B. 463.

(16) Application by liquidator.

- (a) Where a person fraudulently gets himself registered the register may, on the application of the official liquidator, be rectified. *Castellois case*, 2 D.F. & J. 302; *How's case*, (1872) W.N. 186 (172); and other cases cited in Buckley on Companies, 9th Ed., p. 38. N
- (b) But rectification will not be ordered at the instance of the liquidator when the inaccuracy of the register is due to the default of the Company. *Sichell's case*, (1867) 3 Ch. App. 119; see, also, *Re General Floating Dock Co.*, *Hughe's case*, (1867) 15 W.R. 476; *Parson's case*, (1869) L.R. 8 Eq. 656. O

N.B.—Laches, may prevent the Company from claiming their right to have the register rectified. *European Central Ry. Co.*, *Parson's case*, 8 Eq. 656.

(17) Company in liquidation—Application how made.

An application under the section, on the part of a Company in liquidation shall be made in the name of the Company and not of the liquidator. *E. P. Kintrea*, 5 Ch. 95. P

I.—“*Fraudulently or without sufficient cause.*”(1) **Fraudulent mis-statements or suppression—Effect.**

If a man has been induced by fraudulent mis-statements or fraudulent suppression to become a member of a Company, and thereupon his name has been entered on the register that entry will have been without sufficient cause. *Per Kelly, C.B. in Exp. Ward*, L.R. 3 Ex. 180; see, also, *Exp. Kintrea*, 5 Ch. 95 (99). Q

N.B.—The word ‘fraudulently’ in the section has given legislative sanction to the judicial interpretation of the expression “without sufficient cause,” in the above case. *Exp. Ward*. See Russell and Bayley, 3rd Ed., p. 74.

N.B.—For the definitions of the terms ‘fraud’ and ‘misrepresentation,’ see Indian Contract Act (IX of 1872), Ss. 17 and 18.

(2) **Misrepresentation as a ground of rescission, must be one of fact.**

(a) Misrepresentation must be one of fact and not of law. *Beathe v. Ebury*, 7 H.L. 102. R

(b) But a statement of facts which involves a question of law is a statement of fact. *Eaglesfield v. Londonderry*, 4 Ch. D. 693 (703) C.A.; *New Brunswick & Canada, Rail etc., Co. v. Conybeare*, 9 H.L.C. 711; *West London Commercial Bank v. Kitson*, 13 Q.B.D. 360, C.A.; *Derry v. Peek*, 14 A.C. 337; *Holsbury*, Vol. V, p. 129. S

(c) A representation as to the state of a man’s mind is a representation of fact. Though it is very difficult to prove what the state of a man’s mind at a particular time is, yet if it can be ascertained, it is as much a fact as anything else, *Per Bowen, L.J. in Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459. T

(3) **Hope and expectation, holding out—Whether representation of fact.**

Language expressed in the form of hope and expectation may be a representation of fact, although statements as to what will occur in future are not *ex necessitate* statements of fact. (1896) A.C. 273; *Hallows v. Fernie*, 3 Ch. Ap. 467. See *Halsbury*, Vol. V, p. 129 and other cases cited therein on this subject. U

(4) **Exaggeration in prospectus—Whether misrepresentation.**

(a) A mere expression of exaggerated views of the advantages of a Company without any material mis-statement of facts does not amount to misrepresentation. *Denton v. Macneil*, 2 Eq. 352. U-1

(b) Exaggeration is a totally different thing from misrepresentation of any precise or definite facts; as to these there must be *uberrima fides* on the part of the contractors. *Per Wood, V.C., in Ross v. Estates Investment & Co.*, 3 Eq. 122 (136). Y

N.B.—The public ought to have the same opportunity of judging everything which has a material bearing on the true character of the adventure as the promoters themselves possess. *Central Railway Co. of Venezuela v. Kisch*, 2 H.L. 99 (113).

(5) **Falsity of statement—Test.**

It is not essential that some specific allegation of fact should be false. The true test is, was there, taking the whole thing together, false representation. If a number of statements give a false impression, the

1.—“*Fraudulently or without sufficient cause*”—(Continued).

prospectus is none the less false, although it may be difficult to show that any specific statement is untrue. *Aaron's Reefs v. Twiss*, (1896) A.C. 273 (281). W

(6) False statement as to contents of documents.

(a) A false statement in a prospectus as to the contents of a document does not cease to be a misrepresentation merely because the document referred to is offered for inspection. *Smith v. Chadwick*, 20 Ch. Div. 27. X

(b) If a man in a prospectus falsely states the contents of a written document, he cannot escape from such a false statement by saying ‘I offered to show you the document.’ But if he makes an incomplete statement, he can. *Per Jessel, M.R.* in *Smith v. Chadwick*, 20 Ch. Div. 27, 57. See, also, *Redgrave v. Hard*, 20 Ch. Div. 1, 14; *ibid.*, p. 24; *Aaron's Reefs v. Twiss*, (1896) A.C. 273, 287. Y

(7) Concealment, when a ground of rescission.

A concealment of facts in a prospectus is a ground of rescission, if it relates to most material facts with which the public ought to have been acquainted, and is of such a nature that it gives to the truth which is told the character of falsehood. *Oakes v. Turquand*, L.R. 2 H.L. 342. Z

(8) Misrepresentation to be material.

The misrepresentation must be a material inducement to enter into the contract. See *Nicol's case*, 3 De. G. & J. 387; *Smith v. Chadwick*, 20 Ch. Div. 27; *Downes v. Ship*, L.R. 3 H.L. 343. A

(9) Materiality of misrepresentation—Onus of proof.

The onus of proving that a misrepresentation which led to a contract was not a material inducement to enter into it is on the party who has made the representation. *Nicol's case*, 3 De. G. & J. 387. B

(10) Misrepresentation need not be sole inducement.

It is not necessary to show that the misrepresentation was the sole inducement to the contract. The question is whether the applicant acted upon the misrepresentation, not whether he acted upon the misrepresentation alone. He may recover although he was induced also by other things, as for instance his own mistake. *Edgington v. Fismaurice*, 29 Ch. D. 459; *London v. Leeds Bank*, (1887) D.N. 31=56 L.T. 115=56 L.J. (Ch). 321; *Arnison v. Smith*, 41 Ch. D. 348; *Peck v. Derry*, 37 Ch. D. 541 (574), cited in *Buckley*, 9th Ed., p. 88. C

(11) Misrepresentation need not be fraudulent.

(a) A misrepresentation, in order to afford relief, need not be wilfully false. It is immaterial, so far as rescission is concerned, whether it is believed to be true or not. It is not necessary to show such misrepresentation as would sustain an action for deceit. See *Smith's case*, 2 Ch. 604. See, also, *New Brunswick and Canada Railway Co. v. Mugeridge*, 1 Dr. & Sm. 363, 383. *Peck v. Gurney*, L.R. 6 H.L. 377, 390, 408=13 Eq. 79. *Arkwright v. Newbold*, 17 Ch. Div. 301; 6 N.W.P. 350. D

1.—“*Fraudulently or without sufficient cause*”—(Continued).

- (b) It is a rule of law that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must in a civil point of view be held as responsible, as if they had assured that which they knew to be untrue. *Per Lord Cairns in Reese River Silver Mining Co. v. Smith*, L.R. 4 H.L. 84, 79. See, also, *Attorney General v. Ray*, 9 Ch. 397, 402 (N). E

(12) Partial misrepresentation—Effect of.

- (a) A partial misrepresentation has the same effect as a total misrepresentation and destroys the contract entirely; it does not alter, or modify the agreement *pro tanto*. *Clermont v. Tasburg*, 1 Jac. & W. 112; *Rawlins v. Wickham*, 3 De. G. & J. 304, 321; *Adam v. Newbigging*, 34 Ch. D. 582=13 A.C. 308. F
- (b) A person has no right to repudiate one portion of an entire contract on the ground of fraudulent misrepresentation and adhere to the other portion. If the contract is to be avoided on that ground, it must be avoided *in toto*. 9 C.L.R. 467=8 C. 118; see, also, 17 C. 291=16 I.A. 233 (P.C.). G

(13) Misrepresentation, to be made by a party or his agent.

- (a) A misrepresentation in order to vitiate a contract must be made by a party to it or by his agent. *Per Lindley, L.J. in Karberg's case*, (1892) 3 Ch. 1 (19). H
- (b) Where a person has been drawn into a contract to purchase shares belonging to a Company by fraudulent misrepresentations (or by fraudulent concealment) of the directors, and the directors in the name of the Company, seek to enforce that contract, or the person who has been deceived institutes a suit against the Company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the Company, and the purchaser cannot be held to his contract, because a Company cannot retain any benefit which they have obtained through the fraud of their agents. *Per Lord Chelmsford in Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145 (147); see, also, *Nicol's case*, 3 De G. and J. 387; *Peck v. Gurney*, 13 Eq. 79; L.R. 6 H.L. 377 and *Houldsworth v. Glasgow Bank*, 5 A.C. 317, cited in *Buckley on Companies*, 9th Ed., p. 88. I

(14) Misrepresentation by agents—Company's responsibility.

- (a) Any misrepresentations made by the agents of a company which form the foundation of a contract between the company and a third person—those misrepresentations lying at the root of the contract—will entitle the other party to avoid the contract and the company must in that sense take upon themselves the consequences of the misrepresentations of their agents. *Per Wood, V.C. in Henderson v. Lacon*, 5 Eq. 249 (261). J
- (b) But the company cannot be held liable for the unauthorized and fraudulent act of a servant or agent committed not for the general and special benefit of the Company but for the servant's own private ends. *British Mutual Co. v. Charnwood Forest Co.*, 18 Q.B.D. 714 and other cases cited in *Buckley on Companies*, 9th Ed., p. 88. See, also, 6 W.R. 252; 19 M.L.J. 57. K

I.—“*Fraudulently or without sufficient cause*”—(Continued).

- (c) Nor is the company liable if the misrepresentations are made by an agent outside the scope of his authority as when an officer of the company, not being a director, answers enquiries which do not properly fall within the business deputed to him. *Partridge v. Albert Life Assurance Co.*, (Alb. Arl.), 16 Sol. J. 199; see, also, 19 M.L.J. 57 (59). L

(15) Misrepresentation of secretary.

- (a) The Secretary of a Company has no *prima facie* authority to make representations. His authority to make them must be proved. *Barnett, Hoares & Co. v. South London Tramways*, 18 Q.B.D. 815. M
- (b) The duties of a secretary are of a limited and somewhat humble character. *Whitchurch, Lim. v. Cavanagh*, (1902) A.C. 124. N
- (c) He is a mere servant. His duty is to do what he is told, and no person can assume that he has any authority to represent anything at all. *Per Lord Esher, in Barnett v. South London Tramways*, 18 Q.B.D. 815. O

(16) Misrepresentations by manager of Banking Company.

The manager of a Banking Company, making a representation as to the solvency of a customer, although acting within the scope of the general authority given him, may be making the representation in his own character, and not on behalf of the company. *Swift v. Jewsbury*, L.R. 9 Q.B.D. 301. P

(17) Misrepresentation by the director of a Bank.

- (a) Misrepresentations, by the director of a bank, to an intending applicant for purposes of shares, will not bind the bank or enable the purchaser, afterwards to repudiate the contract with the bank. 127 P.R. 1899. Q
- (b) A director of a Company though he may occupy a fiduciary position with regard to the share-holders collectively, holds no such position with regard to the individual share-holders. So, an action will not lie to recover damages, in relation to certain shares in a Company, on the ground that the defendant, a director of the Company, knowing the shares to be worthless, made false representations as to their nature and thus induced the plaintiff to purchase the same. 18 A. 56; see, also, 127 P.R. (1899). R

(18) Misrepresentation by promoter.

A—before incorporation cannot relieve a subscriber of the memorandum from his liabilities. *Lurgan's case*, (1902) 1 Ch. 707; but see *Karberg's case*, (1892) 3 Ch. 1 and 4 C.W.N. 369. S

N.B.—In *Karberg's case*, (1892), 3 Ch. 1 it was held that a misrepresentation in a prospectus issued by the promoters before the incorporation of a Company may be a ground of rescission of the contract to take shares. But Buckley is of opinion that “the ground of the decision in this case was not misrepresentation, but that the contract was made upon terms which were not complied with or possibly that the untruth of C's representation may vitiate the contract if the facts are that A contracted with B, knowing that C had made, and B was relying upon the representation in which case, for purposes of rescission, knowledge of the untruth of the representation is not material.” See Buckley, 9th Ed., p. 90.

I.—“*Fraudulently or without sufficient cause*”—(Continued).

(19) Misrepresentations in prospectus.

(a) If it can be shown that a material representation which is not true, is contained in the prospectus, or in any document forming the foundation of the contract between the Company and the share-holder, and the share-holder comes within a reasonable time, and under proper circumstances, to be released from that contract, the Courts are bound to relieve him from it, and to take his name off any list of share-holders or contributories on which it may have been put. *Per Turner, L.J.*, in *Reese River Mining Co.*, *Smith's case*, 2 Ch. 604 (609); see, also, *Black's case*, 34 Beav. 639=5 N.R. 352; *Rye's case*, 3 Jur. (N.S.) 460; *Ship's case*, 2 D.J. and S. 544; *Stewart's case*, 1 Ch. 574; *Tennent v. Glasgow Bank*, 4 A.C. 615. T

(b) Where, therefore, a person was induced to apply for fifty shares on the faith of statements in the prospectus which were untrue to the knowledge of the directors, and paid the deposit money on those shares on allotment, *held*, that the person was entitled to have his contract to take shares set aside and to be repaid the amount of deposit money. 2 Ind. Jur. N.S. 296. U

(20) Prospectus, not to contain mis-statement or concealment of material facts.

(a) In a prospectus, no mis-statement or concealment of any material facts or circumstances is permitted. The public, invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything materially bearing on its true characters as the promoters themselves possess; and the utmost honesty and candour ought to characterise the statements in the prospectus. *Halsbury*, Vol. V, p. 128. Y

(b) Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to *omit no one fact* within their knowledge the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares. *Per Kindersley, V.C.*, in *New Brunswick and Canada Railway Co. v. Muggeridge*, 1 Dr. and Sm. 363 (381), *approved* in 2 H.L. 99 (113). See, also, the observations of Lord Chelmsford, in *Oakes v. Turquand*, L.R., 2 H.L. 242 and of *Fry, J.*, in *Davies v. London Insurance Co.*, 8 Ch. D. 469 (474); *Buckley on Companies*, 9th Ed., p. 92. W

N.B.—It is not every concealment or suppression of fact that is a ground of rescission. To afford relief, it must be such as to make that which is stated, misleading. *New Brunswick Co. v. Conybeare*, 9 H.L.C. 711 (724); *Houldsworth v. Glasgow Bank*, 5 A.C. 317; *McKeown v. Boudard Co.*, (1896) W.N. 36=65 L.J.Ch. 446 (735).

N.B.—A concealment may sometimes amount to fraud. *Bentinck v. Fena*, 12 A.C. 652.

I.—“Fraudulently or without sufficient cause” —(Continued).

(21) Variation between prospectus and memorandum.

A mere difference between the language of the prospectus and the memorandum is not enough. The question is whether the obligations imposed by the memorandum go beyond those imposed by the prospectus. *Downes v. Ship*, L.R. 3 H.L. 348, 354; *E.P. Briggs*, 1 Eq. 488, 486 = 35 Beav. 273. X

(22) Alteration of circumstances after issue of prospectus.

(a) If a statement in a prospectus, which was true at the time the prospectus was issued, becomes untrue before allotment, the allottee is entitled to rescind. *Anderson's case*, 17 Ch. D. 378; *Scottish Petroleum Co.*, 23 Ch. D. 413 = 49 L.T. 348 = 31 W.R. 846. Y

(b) If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards so altered, that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances, and the Court will not hold the party to whom the representation has been made bound, unless such a communication has been made. *Per Turner, L.J.* in *Trial v. Baring*, 4 D.J. & S. 318, 329. See also, *Scottish Petroleum Co.*, 23 Ch. Div. 413, 438. Z

(23) Misrepresentation inducing a contract to take share—Company's liability—Classes of cases.

The cases in which a company is liable for misrepresentation inducing a contract to take shares may be classified as follows :—

- (i) Where the misrepresentations are made by the directors or other genera, agents of the company entitled to act and acting on its behalf;
- (ii) Where the misrepresentations are made by a special agent of the company, while acting within the scope of his authority, including the case of a person constituted agent by the subsequent adoption of his acts;
- (iii) Where the company can be held affected, before the contract is completed with the knowledge that it is induced by misrepresentation; and
- (iv) Where the contract is made on the basis of certain representations, whether the particulars of them are known to the company or not, and it turns out that some of them were material and untrue. *Per Romer, L.J.* in *Lynde v. Anglo Italian Hemp Spinning Co.*, (1896) 1 Ch. 178. A

N.B.—For instances in which relief has been given on the ground of misrepresentation, and instances in which relief was refused, see cases cited in Buckley, 9th Ed., pp. 93, 94.

(24) Contract induced by fraud—Remedy of member.

(a) The remedy of a person who has been induced to become a share-holder by misrepresentation is *rescission and restitutio in integrum*. He cannot retain the shares and at the same time sue the corporation of which he is a member for damages. *Houldsworth v. Glasgow Bank*, 5 A.C. 317, 323, 334; *Burgess' case*, 15 Ch. D. 507, 513. B

1.—“*Fraudulently or without sufficient cause*”—(Continued).

- (b) If the Company goes into liquidation before the right of rescission is exercised, the share-holder has no remedy at all against the Company. His action for damages would be as irrelevant against the Company in liquidation as it would be as against the going Company. *Houldsworth v. Glasgow Bank*, 5 A.C. 317; *Burgess' case*, 15 Ch. D. 507. **C**
- (c) The Company cannot be sued by a member for damages to be worked out as between the contributories after the creditors have been satisfied. There is no such deferred or secondary right of action against the Company. *Houldsworth v. Glasgow Bank*, 5 A.C. 317, 324; *Addlestone v. Linoleum Co.*, 37 Ch. D. 191, 200; cited in Buckley 9th Ed., p. 103. **D**
- (d) The section is inapplicable to cases where damages are claimed on the ground that rectification cannot be obtained. *Semble*, the Court has no jurisdiction to order damages against the Company, except in cases where order is made for rectification. *Ottas Kopje Mines*, (1893) 1 Ch. 618. **E**
- (e) A share-holder who has lost his right of rescission cannot maintain an action for return of the money paid. *Re Duman*, (1899) 1 Ch. 387, 392. **F**

N.B.—But of a creditor who is entitled under an agreement with the Company for an allotment of paid-up shares in discharge of his debt, has unpaid shares allotted to him, he is not precluded from proving the debt in the winding-up on the footing that, in consequence of the failure of the Company to carry out their part of the bargain, the debt remains undischarged. *E.P. Welton*, (1899) 1 Ch. 108.

N.B.—Though a person defrauded may, by his subsequent dealings, lose his remedy against the Company, he can sue the agents of the Company who made the fraudulent misrepresentation, for damages in an action of deceit. See *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145; *Houldsworth v. Glasgow Bank*, 5 A.C. 317, 328, 331, 340. See, also, *Arnison v. Smith*, 41 Ch. D. 348.

(25) Effect of lapse of time on the right of rescission.

- (a) If a man claims to rescind his contract to take shares in a company, on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claims and relief. *Per James, L.J. in Sharpley v. South Railway Co.*, 2 Ch. Div. 683; see, also, *Aaron's Reefs v. Twiss*, (1896) A.C. 273, 294; *Sewell's case*, (1868) 3 Ch. App. 131, 138. **G**

N.B.—Where however the delay is due to negotiation by the Company, he may, notwithstanding lapse of time, claim relief. *Neill's case*, 15 W.R. 894, cited in Buckley, 9th Ed., p. 97.

- (b) If at the time when a man applies for shares, the memorandum of association is not in existence, he ought, at the very latest when he receives the allotment, to satisfy himself that there is nothing in it to which he objects. *Pell's case*, 2 Ch. 674, 684; see, also, *Oakes v. Turquand*, L.R. 2 H.L. 325, 352; *Lawrence's case*, *Kincaid's case*, 2 Ch. 412; *Wilkinson's case*, 2 Ch. 536; *Hollows v. Fernie*, 3 Ch. 467, 477; *Ogilvie v. Currie*, 37 L.T. (Ch.) 541. **H**

1.—“*Fraudulently or without sufficient cause*”—(Continued).

- (c) Persons who have taken shares in a Company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the Company is established. If they fail to do so, and the objects of the Company are extended beyond those described in the prospectus the persons who have so taken shares on the faith of the prospectus ought to be held to be bound by the acquiescence. *Oakes v. Turquand*, L.R. 2 H.L. 325, 351; see, also, *Per James, L.J.* in *Askew's* case, 22 W.R. 833=31 L.T. 55. I
- (d) If the memorandum is in existence at the time of the application, the applicant ought to look into it before he applies. See *Buckley*, 9th Ed., p. 96. J
- (e) If he takes the shares without examining the memorandum, and has continued to be a member for some time, and other persons have, on the credit of his name, been induced to take shares or deal with the Company, then it is too late for him to get rid of his liability on the ground of having been induced by misrepresentation. *Railway Co. of Venezuela v. Kisch*, L.R., 2 H.L. 99, 125; *Hindley's* case, (1896) 2 Ch. 121. K
- (f) For if he were allowed to rescind at that stage the relief would be given to him not at the expense of those by whose representations he was induced to become member but at the expense of persons who have since taken shares, and perhaps of creditors who have lent money to the Company on the faith of the complaining party being a shareholder. *Downes v. Ship*, L.R., 3 H.L. 348, 356. L

N.B.—As regards the effect of laches it is necessary to distinguish cases in which a share-holder tries to show that he has effectually parted with his shares from those where a person says that he was never a share-holder at all. See *Buckley*, 9th Ed., p. 113. L-1

- (i) If both the share-holders and the Company are in default, the share-holder's right to relief will be lost by laches. (*Ibid.*), pp. 113, 114. See, also, *Walker's* case, 6 Eq. 30; *Head's* case, 3 Eq. 84; *Gower's* case, 6 Eq. 177. M
- (ii) Where the share-holder is not but the Company is in default, the laches will not avail as against the share-holder, but it may avail as against the Company. *Fox's* case, 5 Eq. 118; *Lyster's* case, 4 Eq. 233; *Marshall v. Glamorgan Iron Co.*, 7 Eq. 129, 138; *Fyfe's* case, 4 Ch. 768; *Sichell's* case, 3 Ch. 119; *Taurine Co.*, 25 Ch. D. 118. N
- (iii) Where a person shows, that he had never been a share-holder, and that he had repudiated the shares forced upon him, it is no laches on his part that he does not apply for an order directing the directors to cancel the registration which was void *ab initio*. *Gorriessen's* case, 8 Ch. 507; *E.P. White*, 16 L.T. 276; *Wynnes's* case, 8 Ch. 1002; *Beek's* case, 9 Ch. 392; *Nelson's* case, (1874) W.N. 196; *Baillie's* case, (1898) 1 Ch. 110; 42 Ch. D. 98, 106. See *Buckley*, 9th Ed., pp. 113, 114. O

I.—“*Fraudulently or without sufficient cause*”—(Continued).

(26) Laches—How far affects rectification of contributories list.

- (a) A person, whose name has been wrongly placed on the list of contributories, does not, by mere delay, lose his right to have his name removed from the list, where the delay has occasioned no loss to the estate. *Shewell's case*, 2 Ch. 387; *Fyffe's case*, 4 Ch. 768. P

Quere :—Whether the right would be lost even though the delay had occasioned such loss. (*Ibid.*) Q

- (b) The question of laches does not arise in the case of an application by a liquidator to place a person on the list of contributories. *Sand's case*, 32 L.T. 299. But see *Nat. Bk. of Wales, Massey's case*, 1907, 1 Ch. 582, cited in *Buckley*, 9th Ed., p. 114. R

(27) Right of rescission lost by acquiescence after discovery of misrepresentation.

- (a) If after knowledge of the circumstances which would entitle a member to repudiate, he deals with his shares in a manner inconsistent with repudiation, he cannot afterwards set aside the contract. *Whitehouse's case*, 3 Eq. 790; *E. P. Briggs*, 1 Eq. 483=35 Beav. 273; *Nicol's case*, 3 Deg. & G. 387, 431; *E. P. Blackstone*, 16 L.T. 273; *Scholey v. Central Railway Co. of Venezuela*, 9 Eq. 266 (n); *E. P. Shearman*, 56 L.J. (Ch.) 25=75 L.T. 385. S

- (b) Thus if after the misrepresentation is discovered a member accepts a dividend, or pays a call or takes a transfer of other shares, he is bound. *Scholey v. Central Railway Co. of Venezuela*, 9 Eq. 266 (n); *E. P. Shearman*, 66 L.J. (Ch.) 25=75 L.T. 385; *Paige's case*, 15 W.R. 892. T

Quere :—Whether he is bound if he sells some of his shares *Maturin v. Tredinnick*, 2 N.R. 514=4 N.R. 15. U

- N.B.—(i) The mere supporting of a petition as a contributory after commencing an action for rescission does not bind the member. *Tomlin's case*, (1898) 1 Ch. 104; see, also, *Foulkes v. Quartz Hill Co.*, Cab. & E. 156. U-1

- (ii) A director may not be able to repudiate so readily as other people, for he may have it in his power to ascertain the facts. See *Munster's case*, 14 L.T. 723=14 W.R. 957. U-2

(28) What amounts to sufficient repudiation.

- (a) A repudiation is insufficient, unless the repudiating share-holder also gets his name removed or commences proceedings to have it removed. See *Scottish Petroleum Co.*, 23 Ch. D. 413, 436. Y

- (b) A letter by a share-holder requiring that his name should be at once removed from the register of members, without any subsequent proceedings being taken, is not a sufficient repudiation. *Hare's case*, 4 Ch. D. 503; *Cf. Burge's case*, 15 Ch. D. 507; *Scottish Petroleum Co.*, 23 Ch. D. 413. W

- N.B.—(i) If a person who is entitled to have his name removed from the register on the ground of fraud, has his name removed by the directors on other grounds than those on which he is entitled to rescind, the directors being aware and the share-holder not being aware that he is so entitled, the share-holder is entitled to claim the benefit of his removal and is not liable as a present or past member. See *Wright's case*, 7 Ch. 55; see, also, *London and Suburban Bank, Walmsley's case*, 15 Eq. 274. W-1

I.—“*Fraudulently or without sufficient cause*”—(Continued).

- (ii) For the contract having been induced by fraud, was according to *Oakes v. Turquand* (L.R., 2 H.L. 325) voidable by him, and the directors being conscious of the fraud gave him the relief which, had he known the facts, he might have demanded. Buckley, 9th Ed., p. 102. **W-2**

(29) Contract induced by fraud cannot be rescinded after winding-up.

- (a) A member cannot exercise his right of rescission after the commencement of winding-up; whether the winding-up be voluntary, or by or under the supervision of the Court. See *Stone v. City and County Bank*, 3 C.P.D. 282; *Oakes v. Turquand*, L.R., 2 H.L. 325, 367; *Tennent v. Glasgow Bank*, 4 A.C. 615. **X**
- (b) The same rule applies to cases where a Company stops payment and issues notices convening a meeting to pass resolutions for voluntary winding-up. *Tennent v. Glasgow Bank*, 4 A.C. 615. **Y**
- (c) If shares which a person has agreed to take have with his consent been registered in his name, he cannot escape liability as a contributory unless he has before winding-up, or before stoppage and notice of meeting to wind-up, avoided the contract or done what is tantamounting to avoiding it. *Reese River Silver Mining Co. v. Smith*, 2 Ch. 604 = L.R., 4 H.L. 64; see, also, *Marshall v. Glamorganshire Iron Coal Co.*, 7 Eq. 129, 137; *Gomer's case*, 6 Eq. 77; *Scottish Petroleum Co.*, 23 Ch. D. 413, 436. **Z**
- (d) The winding-up calls into existence new rights and imposes new liabilities which can be enforced only in the winding-up. After winding-up the company ceases to exist and there are only creditors and contributories and the contest is between the share-holder and the creditors of the company, or between the share-holder and his contributories, and not between himself and the corporation. Equities which a share-holder may set up against a company before winding-up, cannot, after winding up, be set up against the creditors of the company or co-contributories. See *National Funds Assurance Co.*, 10 Ch. D. 118, 125; *Burgess' case*, 15 Ch.D. 507, 509; *Whitehouse & Co.*, 9 Ch. D. 595, 599; *Black & Co.'s case*, 8 Ch. 254, 259. **A**
- (e) Whenever the rights of other persons intervene, a contract to take shares though induced by fraud cannot be rescinded. Per *Bramwell, L.J.* in *Stone v. City and County Bank*, 3 C.P.D. 309. **B**
- (f) There may be equities between the share-holders *inter se* which may be adjusted in the course of working out the order; but with these the official manager and the creditors have nothing to do. The former must ascertain who are the existing share-holders of the company, and the latter must bring in their claims against the Company; and those claims must be satisfied by the contributions of all who are share-holders of the company at the date of the winding-up order. Per *Lord Chelmsford* in *Spackman v. Evans*, L.R., 3 H.L. 171, 238. **C**
- (g) Though with regard to Companies under the Act, there is no contract between a creditor of the Company and a share-holder, the contract being only between the Company and the creditor, and though the direct remedy of a creditor is solely against the incorporated body,

I.—“*Fraudulently or without sufficient cause*”—(Continued).

still a share-holder is under a statutory liability by which the creditors have a right to compel him to contribute towards the assets of the Company to the extent of his shares. See *Oakes v. Turquand*, L.R., 2 H.L. 325, 357; *Henderson v. Royal British Bank*, 7 E. & B. 350; *Smith's case*, *Reese River Silver Mining Co.*, 2 Ch. 604, 616; see, also, S. 61, *infra*. D

(h) It is the duty of the official liquidator to collect all the assets of the Company and to distribute them among the creditors. He may assert rights as against the Company and may assume a position as against the members which the Company itself may not be in a position to assert. See *Per Lord Hatherley* in *Waterhouse v. Jamieson*, L.R., 2 H.L. Sc. 29, 32; and *Jessel, M.R.* in *National Funds Co.*, 10 Ch. D. 123; see, also, *London Celluloid Co.*, 39 Ch. Div. 190. E

(i) The share-holder cannot say that the creditor is entitled to look only to the assets of the Company for payment of his debts, and that the liquidator can only take the rights of the Company subject to the equities which bind the Company. The existence of a good legal or equitable defence against the Company would not affect the members' statutory liability to contribute to the assets required for the payment of the Company's debts. See *Per Cranworth* in *Oakes v. Turquand*, L.R., 2 H.L. 325, 357. F

N.B.—*Oakes v. Turquand* only decided that a share-holder cannot avoid a contract induced by fraud, after the commencement of winding-up, but it did not decide affirmatively that up to the time of winding up it could be rescinded on that ground. Whether it can or cannot be rescinded must depend upon the circumstances of each case. See, also, *Tenant v. Glasgow Bank*, 4 A.C. 615, 621, and other cases cited at pp. 99 and 100 in *Buckley*, 9th Edition.

(30) **Application before winding-up, effect of winding-up order before judgment.**

(a) A share-holder will on a proper cause being made out, be entitled to relief, if application is made between the petition for winding-up, and the winding-up order, though judgment is passed after the winding-up order. In such case the rescission ordered by the Court dates back to the time when the share-holder has taken steps to rescind the contract. *Reese River Silver Mining Co. v. Smith*, 2 Ch. 604=L.R., 4 H.L. 64; *Henderson v. Lacon*, 5 Eq. 249, 263. G

(b) It is not necessary that when there is a number of share-holders in a similar position, there should be a separate proceeding by each. If proceedings have been taken by one, it is sufficient to protect another that he promptly informs the company that he intends to be bound by the decision or takes such steps as will bind him thereby. See *Buckley*, 9th Ed., pp. 101, 102. H

(c) The test is whether the party claiming the benefit of the decision, had from the commencement of the proceedings, elected to be bound by it, or whether he had reserved to himself liberty to refuse to be bound if the decision were adverse. In the former case he would be within the principle of *Reese River case*, in the latter, he would not. See *Buckley*, 9th Ed., p. 102. See, also *Pawle's case*, 4 Ch. 497; *McNeill's case*, 10 Eq. 503; *Ashley's case*, 9 Eq. 263; *Thomson's case*, 5 Manson, 282. I

1.—“*Fraudulently or without sufficient cause*”—(Continued).

(31) Winding-up no bar, if the agreement is void.

If the agreement in pursuance of which a person has been registered as a member is not merely voidable, but is void, there is no contract; the decision in *Oakes v. Turquand* does not apply, and he can have his name removed from the Register even after the commencement of winding-up. See *Alabaster's case*, 7 Eq. 273. See, also, *Gorissen's case*, 8 Ch. 507; *E.P. White*, 16 L.T. 276; *Baillie's case*, (1908) 1 Ch. 110; *Wynne's case*, 8 Ch. 1002; *Beek's case*, 9 Ch. 392; *Nelson's case*, (1874) W.N. 196. J

N.B.—For the liquidator standing in the place of the company cannot enlarge the engagement which the alleged share-holder has entered into. *Waterhouse v. Jamieson*, L.R., 2 H.L. Sc. 29, cited in *Buckley*, 9th Ed., p. 103.

(32) Voidable contract—Meaning of.

A voidable contract does not mean a contract that is void until ratified, but means a contract that is valid until rescinded where the rights of third parties intervene. *Oakes v. Turquand*, L.R., 2 H.L. 325, 375; *Reese River Silver Mining Co. v. Smith*, L.R., 4 H.L. 64, 73. K

(33) Contract induced by fraud, only voidable.

(a) A contract induced by fraud is not void but only voidable at the option of the party defrauded provided that he avoids it while the matters remain in the same position. *Deposit Life Assurance Co. v. Ayscough*, 6 E. & B. 761; *Mizer's case*, 4 De. & J. 575; *Western Bank of Scotland v. Addie*, 4 L.R., 1 H.L. Sc. 145, 156; *Clark v. Dickson*, E.B. & E. 148; *Clough v. L. & N.W. Ry.*, L.R., 7 Ex. 26, 34, 35, cited in *Buckley*, 9th Ed., p. 98. L

(b) The contract continues valid until the party defrauded has determined his election by cancelling it. If he once determines his election, it is determined for ever. 117 P.R. (1879); see, also, 28 B. 639=6 Bom. L.R. 592. M

(34) Liability of Directors for fraud.

(a) A person who has been induced to become a share-holder by the fraudulent misrepresentations of the directors, can make the directors liable for damages in an action of deceit, though he might have lost his right of rescission against the Company. See *Arnison v. Smith*, 41 Ch. D. 348. N

(b) To sustain an action of deceit against the directors personally, a share-holder must show (1) that a fraudulent misrepresentation was made by them and (2) that he was deceived by such misrepresentation. *Derry v. Peek*, 14 A.C. 337. O

(35) What constitutes fraud.

(a) Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. *Per Lord Herschell in Derry v. Peek*, 14 A.C. 337. P

(b) To prevent a false statement from being fraudulent there must always be an honest belief in its truth, and one who knowingly alleges that which is false, has obviously no such belief. (*Ibid.*) Q

1.—“*Fraudulently or without sufficient cause*”—(Continued).(36) **Honest misrepresentation, though made carelessly, not fraudulent.**

(a) An untrue statement believed to be true by the party who makes it, is not fraudulent though the belief has been formed carelessly and on insufficient grounds. Making a false statement through want of care falls far short of and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. *Derry v. Peek*, 14 A.C. 337, 361, 375; *Bishop v. Balkis Co.*, 25 Q.B.D. 512, 521; *Angus v. Clifford*, (1891) 2 Ch. 449, 464. **R**

(b) An action for a negligent as distinguished from a fraudulent misrepresentation cannot be supported. *Angus v. Clifford*, (1891) 2 Ch. 449, 464. **S**

N.B.—To sustain an action for rescission it is immaterial that the representation was innocent. But, for an action of deceit, it is necessary that there shall have been deceit. *Derry v. Peek*, 14 A.C. 337, 359; *Arkwright v. Newbold*, 17 Ch. D. 301. **T**

(37) **Reasonable grounds of belief.**

(a) Where a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. But, if it be found as a fact that the belief was really entertained, the absence of reasonable grounds will not constitute a fraud where having regard to the belief there was in fact no fraud. *Derry v. Peek*, 14 A.C. 337, 344, 345, 350, 352, 358, 360, 363, 369, 375 and 376; *Western Bank of Scotland v. Addie*, L.R., 1 H.L., Sc. 145, 168, referred to. **U**

(b) To constitute fraud, there must be the *mens rea*. *Per Halsbury, L.C.* *Arnison v. Smith*, 41 Ch. Div. 348; *Derry v. Peek*, 14 A.C. 337, 345. **Y**

(38) **Untrue statement made recklessly, fraudulent.**

A person who carelessly makes an untrue statement not knowing whether it is true or not is liable to an action for deceit. “An untrue statement as to the truth or falsity of which the man who makes it has no belief, is fraudulent, for in making it, he affirms he believes it, which is false. *Per Lord Bramwell in Smith v. Chadwick*, 9 A. C. 203. **W**

(39) **Motive immaterial.**

If fraud is proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. *Per Lord Herschell in Derry v. Peek*, 14 A.C. 337; see, also, *Peek v. Gurney*, L.R., 6 H.L. 377, 409; *Arnison v. Smith*, 41 Ch. D. 348, 372. **X**

(40) **More non-disclosure of material facts—Not fraudulent.**

(a) Mere non-disclosure of material facts will not ground an action for deceit. There must be misrepresentation made either with knowledge of its being false or with a reckless disregard of its being true. See *Arkwright v. Newbold*, 17 Ch. D. 301, 318 and 320; *Eddington v. Fitzmaurice*, 29 Ch. D. 459; *Peek v. Gurney*, L.R., 6 H.L. 377, 403=13 Eq. 79; *Derry v. Peek*, 14 A. C. 337, 359. **Y**

I.—“*Fraudulently or without sufficient cause*”—(Continued).

- (b) Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. [Explanation to S. 17 of the Indian Contract Act (IX of 1872)]. Z

(41) **Misrepresentation must be material and an inducement to contract.**

- (a) In an action for deceit, the plaintiff must also show that he was induced to enter into the contract by the representations of the defendant. Hence, if the mis-statement is so trivial that it could not have affected the plaintiff, the defendant is not liable. See *Derry v. Peek*, 14 A. C. 337; *Smith v. Chadwick* 20, Ch. D. 27, 44, 45=9 A.C. 187; *Cann v. Wilson*, 39 Ch. D. 39; *Angus v. Clifford*, (1891) 2 Ch. 449. A
- (b) If the statement is not obviously material or is ambiguous, the plaintiff must, in the former case, prove it to be material, and in the latter case, prove the sense in which he understood it, and must in either case prove that he was induced by it. *Smith v. Chadwick*, 20 Ch. D. 27, 45 and 64=9 A.C. 187. B

N.B.—(i) As regards the meaning of words, a man cannot be heard to say that he did not know the popular meaning of the words used; if a man uses language which in its ordinary and natural sense conveys a wrong impression, he cannot be heard to say that he did not intend to deceive. *Arnison v. Smith*, 41 Ch. D. 348, 368, 373. B-1

- (ii) Buckley doubts whether *Derry v. Peek* (14 A.C. 337), and *Angus v. Clifford*, (1891, 2 Ch. 449) do not render it necessary to modify the above statements. See Buckley on Companies, 9th Ed., p. 107. B-2

- (iii) The question whether a statement is of such a character, as to have induced the contract is one of fact. *Smith v. Chadwick*, 9 A.C. 187, 196; *Arnison v. Smith*, 41 Ch. D. 348, 369; *Aaron's Reefs v. Twiss*, (1896) A.C. 273, 280. B-3

- (c) If the materiality of the statement is obvious, and is such as to induce the contract, the defence, if any, must be (i) the applicant knew the facts, or (ii) that he avowedly did not rely upon the facts stated, or (iii) that he contracted to take the matter at his own risk. *Smith v. Chadwick*, 20 Ch. D. 27, 44 45; *Redgrave v. Hurd*, 20 Ch. D. 1, 21.C

(42) **Existence of means of knowing truth, no answer to an action of deceit.**

The defendant cannot escape liability by merely showing that the party deceived made some investigation into the facts, or that he had the means of discovering the truth and did not sufficiently avail himself of them. In case of false representation, negligence or laches, can afford no defence, unless the delay is such as to bring in the law of limitation. *Redgrave v. Hurd*, 20 Ch. D. 1, 13, 22, 24; cited in Buckley, 9th Ed., p. 107. See, also, 11 M. 419; 41 P.R. 1886. D

(43) **Misrepresentation need not be the sole inducement.**

If the share-holder shows that he acted upon the misrepresentation, it is not necessary to prove further that the misrepresentation was the sole inducement. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *London and Leeds Bank*, (1887) W.N. 31=56 L.T. 115=56 L.J. (Ch.) 321; *Arnison v. Smith*, 41 Ch. D. 348, 359, 369; *Peek v. Derry*, 37 Ch. D. 541, 574. E

I.—“*Fraudulently or without sufficient cause*”—(Continued).

(44) Action of deceit—Measure of damages.

- (a) The amount of damages recoverable in an action against directors for false representation contained in a prospectus, is the difference between the price paid by the plaintiff and the value of the shares on the date of allotment. *Kaskett v. Keswick*, (1902) 2 Ch. 468. **F**

N.B.—The value of the shares is not to be ascertained by their market value at the time, for, that may have been influenced by the misrepresentations themselves. In determining the value, subsequent events including, in the case of a Company in liquidation, the result of the winding-up, may be taken into account. See *Buckley*, 9th Ed., p. 109; also *Peek v. Derry*, 37 Ch. D. 541, 590; *Broome v. Speak*, (1903) 1 Ch. 605, 623; *Arkwright v. Newbold*, 17 Ch. D. 301; *Twyecross v. Grant*, 2 O.P.D. 469; *Arnison v. Smith*, 41 Ch. D. 343, 363; cited in *Buckley*, 9th Ed., p. 109. **G**

- (b) The highest limit of damages is the money which the share-holder paid. *Buckley*, 9th Ed., p. 109. **H**

(45) Action of deceit not barred by laches.

An action of deceit is not barred by laches. The only amount of delay which would affect the right to relief is that fixed by the law of Limitation. *Peek v. Gurney*, L.R., 6 H.L. 377, 384, 402. **I**

(46) Action of deceit—Plaint to disclose particulars of fraud.

- (a) A plaint charging fraud, must set forth particulars; general allegations, however strong the words, do not amount to an averment of fraud, of which a Court can take notice. 15 C. 533=15 I.A. 119 (P.C.). See, also, 18 B. 144; 19 B. 593 (601); 2 C.L.R. 26. **J**

- (b) A plaint not disclosing specific instances of fraud, but containing general allegations, must either be returned for amendment or rejected. 18 B. 144. **K**

(47) Directors when responsible to purchaser from an allottee, for misrepresentation in prospectus.

- (a) A purchaser of shares from an allottee is not entitled to sue the directors for misrepresentations contained in the prospectus issued by them unless he (the allottee) can show some direct communication between them and himself in the communication of the prospectus and that he was thereby influenced to become a transferee. *Peek v. Gurney*, L.R., 6 H.L. 377; *Andrews v. Mockford*, 1896, 1 Q.B. 372, 388. **L**

N.B.—The proper purpose of a prospectus is to invite persons to become allottees, and when it has performed this purpose its office is in general exhausted. (*Ibid.*), see *Buckley*, 9th Ed., p. 110. **M**

- (b) A purchaser from an allottee may sue the directors for misrepresentations in the prospectus, if they had been guilty of a continuous fraud, the fraud commencing with the issue of the false prospectus and culminating in subsequent fraudulent statements intended by the directors to influence the purchasers of shares. *Andrews v. Mockford*, (1896) 1 Q.B. 372. **N**

1.—“*Fraudulently or without sufficient cause*”—(Concluded).

(48) Director how far liable for acts of co-directors or agents.

- (a) A director is liable only for his own personal fraud, or for the fraud of his co-directors or agents of the Company which he has expressly authorized or connived at. *Weir v. Barnett*, 3 Ex. D. 82; *Weir v. Bell*, 3 Ex. D. 238; *Cargill v. Bomer*, 10 Ch. D. 502; but see the judgment of Cotton, L.J., in *Weir v. Bell*, 3 Ex. D. 240. O
- (b) An agent is generally not responsible for the acts of another agent unless he has done something by which he makes himself a principal in the fraud. *Cargill v. Bomer*, 10 Ch. D. 502, 514, cited in Buckley, 9th Ed., p. 107. P

(49) Director's liability for fraud of sub-agents.

- (a) Directors who employ sub-agents to transact some business of the Company are not liable for the fraud of the sub-agents in the transactions in which they were employed, for, in such case the Company and not the directors are the principals. *Weir v. Barnett*, 3 Ex. D. 82; see, also, Indian Contract Act (IX of 1872), S. 192. Q

N.B.—But see the judgment of Cotton, L.J., in *Weir v. Bell*, 3 Ex. D. 238, to the contrary.

- (b) A director, however, would be responsible for the fraud of a sub-agent appointed by him, if the director had really acted as principal, and only colorably as an agent in the transaction. See *Weir v. Barnett*, 3 Ex. D. 82. R

(50) Which directors are liable for misrepresentation in prospectus.

- (a) As a general rule, only those persons, whose names appear in the prospectus as directors, are liable. Even though they were not present at the meeting in which the prospectus was approved they may be bound by ratification. See Buckley, 9th Ed., p. 168; see, also, *Denham & Co.*, 25 Ch. D. 765. S
- (b) But, if it is shown that their names were inserted without their authority or that they never in fact knew the contents of the prospectus or approved or rectified it, they will not be liable. See Buckley, 9th Ed., p. 108. T

2.—“*If default... to be a member of the Company.*”

(1) Default, or unnecessary delay—What constitutes.

- (a) A transfer to which no objection can be made ought to be confirmed by the directors at the first meeting at which, in the ordinary course of business, it can be confirmed, and thereupon registered. If not so confirmed there is “unnecessary delay.” Buckley, 9th Edition, p. 111. U
- (b) But, if there is any valid objection to the registration of the transfer, there can be no “unnecessary delay” on the part of the company. *Musgrave and Hart's case*, 5 Eq. 193; *Marino's case*, 2 Ch. 596. See, also, 26 M. 79. Y
- (c) Hence, the Court cannot interfere and rectify the register if the conditions imposed by the articles have not been complied with. See *Marino's case*, 2 Ch. 596; *Musgrave and Hart's case*, 5 Eq. 195. W
- (d) Thus, where the articles require a transfer to be executed by both the transferor and the transferee and a transfer has not been so executed, the Court cannot rectify the register in winding-up. (*Ibid.*) X

2.—“If default....to be a member of the Company”—(Continued).

- (e) Similarly, if the directors having under the articles, a discretion to reject a transfer, have had no opportunity to exercise their discretion, the Court cannot substitute its discretion for theirs. *Walker's case*, 2 Eq. 554. Y
- (f) Though, directors, empowered by the articles to reject transfers to persons whom they consider irresponsible, cannot reject a transfer in the absence of real objection to the transferee, still he cannot, by not declaring their objection within a reasonable time, be deemed to have waived it. The transferor may call upon them to register the transfer or say why they would not; but if he does not so call upon them, they will not lose the benefit of the objection by delay, but may bring it forward at any time. *Shipman's case*, 9 Eq. 219; *Gustard's case*, 8 Eq. 488, cited in Buckley, 9th Edition, p. 112. Z
- (g) Again, a share-holder is not entitled to have the register rectified, because the directors have refused to register a transfer on the eve of liquidation. The directors ought to refuse registration if the facts are such, that the rights of creditors have intervened though a winding-up has not commenced. See Buckley, 9th Ed., pp. 111, 112. A
- (h) It is competent for the directors to pass a resolution not to record future transfers which may seriously affect and alter the liability of members, provided the resolution is passed in the fair and *bona fide* exercise of their powers. *Alex Mitchell's case*, 4 A.C. 548; *Rutherford's case*, (*Ibid.*); *Nelson Mitchell's case*, (*Ibid.*) 624; *Glasgow Bank cases*, 4 A.C. 574. B

(2) Rectification after winding-up.

- (a) If a transfer to which no objection can be taken has been presented for registration before winding-up, and the directors have neglected to approve or disapprove of it, the Court may, even after the commencement of the winding-up, rectify the register. *Hill's case*, 4 Ch. 769 (n). C
- (b) If there is no evidence of any objection to the transferee, the Court will presume that the directors would have approved the transfer. *Evans v. Wood*, 5 Eq. 9; see, also, *Paine v. Hutchinson*, 3 Ch. 388, 393. D
- (c) But, the Court will not, in winding up, rectify the register, unless the omission to substitute the transferee's name for that of the transferor is due to the default or neglect of the Company. *Marshall v. Glamorgan Iron & Coal Co.*, 7 Eq. 129; see, also, 26 M. 79. E
- (d) A transferor cannot escape liability in the winding-up unless he shows that at some time or other there was, or but for the default of the Company, would have been upon the register a transferee liable in respect of the shares. See *Curtis' case*, 6 Eq. 454. F
- (e) If a man being a share-holder has sold his shares, he is not relieved from being a share-holder, if, owing to his own neglect or that of his transferee, or if, in fact, owing to any cause except the neglect of the Company his transferee's name has not been substituted for his at the date of the winding up. If the omission to substitute the name of the transferee is owing entirely to the neglect and default of the Company, he will be relieved. *Per Gifford, V.C.*, in *Marshall v. Glamorgan Iron & Coal Co.*, 7 Eq. 129, 137. G

2.—“If default....to be a member of the Company”—(Concluded).

- (f) “A person who is once a share-holder must remain a share-holder unless he can show that he has in some lawful way got rid of his liability.”
Per Gifford, L.J., *Addison's case*, 5 Ch. 294, 297. **H**
- (g) “Every one, who has at any one time become a share-holder and is unable to show that at the date of the order he had ceased to belong to the Company either by the forfeiture or transfer of his shares, or in some other authorized manner, must be placed upon the list,” Per Chelmsford, L.J. *Spackman v. Evans*, L.R., 3 H.L. 171, 238. **I**
- (h) Even where the transfer is complete and is registered, the transferor cannot escape liability, if the transfer is invalid. See *Heritagis' case*, 9 Eq. 5; *Mann's case*, 3 Ch. 459 (n). **J**

N.B.—“Suppose transfer enacted and left for registration at such a date that if it had been registered without default or unnecessary delay on the part of the Company the registration would have been complete more than a year before the winding-up commenced; *semble*, after winding-up the date of winding-up may be carried back so as to preclude liability as a B, contributory.” Buckley, 9th Ed., p. 113. **K**

3.—“The person or member....may be rectified.”

(1) Application to have a transfer registered—Transferor whether a necessary party.

- (a) Where a company refuses to register a transfer, it is not necessary for the transferor to join the transferee in his application under the section. 22 A. 410=20 A.W.N. 142. **L**
- (b) The term “person aggrieved” is, wide enough to include the transferee of shares in a Company whose legal title the Company refuses to recognise, and the Court can order rectification on the application of such transferee. 16 B. 398. **M**
- (c) But if the transferee's title is not complete, he has no right to apply under the section. See 16 B. 398. **N**

(2) Application for rectification—Applicability of S. 45, Specific Relief Act.

A transferee whose transfer has been refused to be registered by the directors can proceed only under this section which affords a remedy both specific, adequate, and appropriate, and has no right to proceed under S. 45 of the Specific Relief Act which applies only where the applicant has no other specific and legal remedy. 16 B. 398. **O**

4.—“May direct the Company....sustained.”

(1) Costs in the event of rectification, by whom payable.

- (a) This section, like S. 35 of the English Companies Act of 1862, empowers the Court to visit the applicant with costs, and if it rectifies the register, to order costs, and damages to be paid by the company, but gives no authority to order payment of costs by any person other than the company; this is an indication that the section is not applicable to cases of specific performance of contract for the purchase and sale of shares. *Ward and Henry's case*, 2 Ch. 481, 442; *Musgrave and Hart's case*, 5 Eq. 123, 199; *E.P. Sargent*, 17 Eq. 273, 276. See, also, Buckley, 9th Ed., p. 118. **P**

4.—“*May direct the Company . . . sustained*”—(Concluded).

(b) Hence, if an application is brought within the section by showing that the applicant has a legal title, and if it is shown that the company was wrong in siding the wrong party, the Court, not being authorized to make that wrong party pay the costs, would direct the company to pay the same. *E.P. Sargent*, 17 Eq. 273. Q

(c) But if the application is made as part of winding-up proceedings, the Court has jurisdiction to order the person against whom the application is made to pay costs. *Bank of Hindustan, China, and Japan*, *E.P. Kintrea*, 5 Ch. 95. R

Quære.—Whether the rules above stated are in any way affected by the provisions of S. 35 of the Civil Procedure Code (Act V of 1908), *Cf.* in re *Fisher*, (1894) 1 Ch. 53. S

(2) Damages payable by Company on repudiation—Measure of.

(a) Where an allottee obtains against the Company an order for rectification in respect of the shares upon which payments have been made to the Company, the measure of damages will be the amount paid upon the shares, together with interest thereon, the interest being given, in order to restore the parties, as far as possible, to their original position. See *Railway Time Tables Co.*, *E.P. Sandys*, 42 Ch. D. 98, 108; see, also, *Addlestone Linoeum Co.*, 37 Ch. D. 191, 205; *Alunada Tivits Co.*, 38 Ch. D. 415, 424; *Wainwright's case*, (1890) W.N. 3 = 62 L.T. 30 = 63 L.T. 429; *Karberg's case*, 1892, 3 Ch. 1, 17, *cited in* Buckley, 9th Ed., p. 119. T

(b) A person to whom misrepresentations have been made by the agents of a Company acting on its behalf, can make the Company liable, only to the extent to which it has profited by the fraud of its agents. It cannot be sued as a wrongdoer. See Buckley, 9th Ed., p. 104. T-1

(c) The amount thus paid though recovered as damages is not ‘unliquidated damages’ and if the Company goes into liquidation after an order of rectification has been obtained, the share-holder, can prove for the amount as a creditor. *Alison's case*, 15 Eq., 394 = 9 Ch. 1; *Askew's case*, 9 Ch. 664; *British Gold Fields*, 1899, 2 Ch. 7. U

(d) But he cannot render the Company liable as trustees for the moneys of the share-holder in their hands. *Stewart v. Austin*, 3 Eq. 299. Y

5—“*Provided . . . shall lie.*”(1) *Proviso—Omission of, in the English Act.*

The words “provided may . . . be raised” which were taken from the 35th section of the English Companies Act of 1862 have been omitted from the English Companies (Consolidation) Act of 1908 (S. 32), the same being considered unnecessary, having regard to the Rules of the Supreme Court, Orders 33, 34. W

(2) *Power to direct trial of issue.*

The Court may direct an issue to be tried. Halsbury, Vol. V. p. 156. X

(3) *Order under the section—Appeal.*

An order passed under this section is appealable although no issue has been directed upon a question of title. The last sentence of the section is not confined to the case in which an issue has been directed upon a question of title. The words apply to the whole section. 26 C. 944. Y

59. Whenever any order has been made for rectifying the register in the case of a Company hereby required to send a list of its members to the registrar, the Court shall, by its order, direct that due notice of such rectification be given to the Registrar ¹.

Notice to Registrar of rectification of register.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 32, sub-sec. 4 of the English Companies (Consolidation) Act of 1908. **Z**

1.—“ The Court shall.... to the Registrar.”

Notice to Registrar—How served.

Any notice to the Registrar of joint stock Companies may be served by sending it to him through post by a registered letter or by delivering it to him or by leaving it for him at his office. See S. 89, *infra*. **A**

60. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

Register to be evidence.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 33 of the English Companies (Consolidation) Act of 1908. **B**

(2) Register of members—*Prima facie* evidence.

(a) The register of members is *prima facie* evidence of everything that constitutes membership, and the *onus* lies on the person who denies that he is a member to prove that he is not a member. 9 A. 366. **C**

(b) If a person, who is benefited by the *prima facie* evidence afforded by the register, does not stand upon such evidence until it is rebutted by the evidence adduced by the opposite party, but goes further and produces oral evidence in support of the statements in the register, he does so at his own risk, for, the oral evidence may throw discredit on the register and displace the presumption which the register affords. 9 A. 366. **D**

(c) As the register is only *prima facie* evidence of the matters contained therein, it may, even in proceedings in which the register cannot be rectified, be proved that the entries in it are incorrect. Thus, though a Magistrate cannot order the rectification of the register of members, he is not thereby precluded, in proceedings taken before him against a Company or the directors of a Company for contravening the provisions of S. 47, *supra*, from receiving evidence of facts showing that the entries in it are incorrect. *Briton Medical Association*. 39 Ch. D. 61. **E**

N.B.—For the particulars required to be entered in the register of members, see S. 47, *supra*.

Liability of Members.

61. In the event of a Company formed under this Act being wound up, every present and past member of such Company shall be liable to contribute to the assets of the Company¹ to an amount sufficient for payment of the debts and liabilities of the Company and the costs, charges and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories, amongst themselves, with the qualifications following (that is to say):—

Liability of present and past members of Company.

- (a) no past member shall be liable to contribute to the assets of the Company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up²;
- (b) no past member shall be liable to contribute in respect of any debt or liability of the Company contracted after the time at which he ceased to be a member³;
- (c) no past member shall be liable to contribute to the assets of the Company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act⁴;
- (d) in the case of a Company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member⁵;
- (e) in the case of a Company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association;
- (f) nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the Company are alone made liable in respect of such policy or contract⁶;
- (g) no sum due to any member of a Company in his character of a member, by way of dividends, profits or otherwise, shall be deemed to be a debt of the Company payable to such member in a case of competition between

himself and any other creditor not being a member of the Company⁷; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

Explanation I.—The liability of past members is a liability to contribute to the general assets of the Company, against which assets creditors (at whatever time their debts may have been contracted) have equal rights⁸.

Explanation II.—In estimating the debts to which a past member is liable, all dividends paid on these debts under the winding-up must be deducted.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 123, sub-S. 1, of the English Companies (Consolidation) Act of 1908.

The English Act does not contain provisions corresponding to Explanations I and II of S. 61 of the Indian Act. F & G

(2) Scope of the section.

(a) This section makes every member of a Company liable to contribute to assets of the Company to an amount necessary for the payment of debts and liabilities of the Company, the costs, charges and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves. 20 B. 654. H

(b) The provisions of this section are applicable to all kinds of winding up. See per Jessel, M.R. in *Whitehouse & Co.*, 9 Ch.D. 595, 599. I

(3) Effect of the section on share-holders.

(a) The section is to be read literally and not with reference to the previous liability of share-holders or by analogy to the law of partnership; it must be read as imposing new liabilities on the members of the Company—liabilities imposed and defined by the section. *Webb v. Whiffin*, L.R., 5 H.L. 711 &c. J

(b) The section imposes new liabilities upon members when a Company is wound up. The winding-up order entirely alters the position of the share-holders and makes the share-holders, contributories and contributories in a totally different way, in some respects as regards the debts and liabilities of the concern from what they were before. *Burgess' case*, 15 Ch. D. 507, 511; See, also, *Webb v. Whiffin*, L.R. 5 H.L. 711; *Whitehouse & Co.*, 9 Ch. D. 595, 599; *National Funds Assurance Co.*, 10 Ch. D. 118, 125; *West of England Bank, E. P. Hatcher*, 12 Ch. D. 248; *Gill's case*, 12 Ch.D. 755. K

I.—“Every present.... to the assets of the Company.”

(1) Contributions under the section, what are.

- (a) A contribution under the section includes unpaid calls made before the winding-up as well as those made after the winding-up. The fact that a call made before winding-up is a debt due to the Company does not affect the new liability to contribute, and such an unpaid call made before winding-up though barred by limitation, can be recovered as a contribution. 20 B. 654 (658) following *Whitehouse & Co.*, 9 Ch. D. 600. See, also, 31 M. 66; *Kathywar Trading Co.* reported in Times of India, 2nd May, 1887, and cited in Russell and Bayley, 3rd Ed., p. 85. L
- (b) For, although, in a winding up, the liquidator is substituted for, and enforces the rights of the creditors in right of the Company, yet the winding-up order calls into existence new rights and new liabilities which did not exist before; and the equities which might have been set up against the company cannot prevail against the liquidator as representing the creditors. 10 B. 483 (486). M
- (c) ‘Contribution’ means the amount payable by a member as such, and does not include debts payable to the Company, and the section therefore does not relieve a share-holder of a limited Company, from his obligation to pay a debt due to the Company, though no amount remains unpaid on his shares. See *Lion Mutual Marine Insurance Co. v. Tucker*, 12 Q.B.D. 176. See, also, *Merc. Mut. Mar. Ins. Ass.*, 25 Ch. D. 415. N

(2) Liability to contribute—Nature of.

- (a) The liability to contribute, imposed by this section is not a debt due to the Company, and is quite distinct from the property of the Company. See per Jessel, M.R. in *Whitehouse & Co.*, 9 Ch. D. 598, also *Colonial Trust Corporation. E.P. Bradshaw*, 15 Ch. D. 471. O
- (b) The Court has no discretion to refuse to make an order for payment of calls due in a winding-up, *Kathywar & Co.*, per Farran, J. reported in Times of India, 2nd May, 1887. P

N.B.—For the nature of the liability of contributory, see further, S. 125, *infra*.

(3) Who is a contributory.

- (a) S. 124, *infra* defines a contributory as ‘a person liable to contribute to the assets of a Company under this Act in the event of the same being wound up’ and the present sections sets forth the persons who are thus liable, and it is to the description given in this section that S. 124, *infra*, refers. See Buckley, 9th Ed., p. 282. Q
- (b) A member’s liability to contribute attaches on his death to his estate; the estate is liable for the payment of all calls standing in his name, and the personal representatives of the deceased member are liable only in their representative character, *Houldsworth v. Evans*, (1868) L.R. 3 H.L. 263. R

(4) Contributories—Examples.

- (a) A transferee of shares by way of legal mortgage is liable as a contributory. *Weikersham’s case*, 8 Ch. 831; *Addison’s case*, 5 Ch. 294; *Asiatic Banking Corp. Royal Bank of India’s case*, 7 Eq. 91=4 Ch. 252. S

1.—“Every present....to the assets of the Company”—(Continued).

N.B.—But an equitable mortgagee who has not been registered as a shareholder, is not a member, and is not liable as a contributory. *Sichell's* case, 3 Ch. 119; see, also, *Gray's* case, 1 Ch. D. 664.

(b) A person who takes shares for himself, in a fictitious or false name is liable as if he has taken them in his own name. *Pugh's* case, *Sharman's* case, 13 Eq. 566; *Savigny's* case, 1899, W.N. 2. T

N.B.—But, if a person not intending to take shares for himself applies fraudulently in the name of another without that other's consent, and shares are registered in the name of that other, neither is liable as a contributory. The liability is for fraud. *Coventry's* case, 1891, 1 Ch. 202.

N.B.—If A *bona fide* purchases shares in the name of B with B's consent as a trustee for A, A is not liable as a contributory. *National Bank of Wales, Massey's* case, 1907, 1 Ch. 582.

(c) Where a *bonus* improperly declared has been applied in payment of the amount due on shares, the share-holders will not thereby be relieved from their liability to contribute under this section. *County. Mar. Ins. Co., Rance's* case, 6 Ch. 104; *Merc. Trading Co., Stringer's* case, 4 Ch. 475; *Cardiff Coal Co. v. Norton*, 2 Eq. 558=2 Ch. 405. U

(d) Where directors having power to receive payment of calls in advance, paid the amount remaining uncalled on their shares, and on the same day appropriated the money in payment of their fees, *held*, there was no *bona fide* payment of calls in advance, and the directors were not relieved from liability on their shares. *European Central Railway, Co., Sykes's* case, 13 Eq. 255; see, also, *Mason's Hull Tavern Co. Habershon's* case, 5 Eq. 286. Y

(e) The names of the Indian share-holders of a Company registered in England were entered in a register of the Company kept in Bombay, but not in the books of the London Office, nor was a return of their names made to the Registrar of Joint Stock Companies. The Company having gone to liquidation, the liquidator placed the names of the Indian members on the list of contributories. *Held*, they were liable to contribute rateably to the debts which the English share-holders had paid. *East India Cotton Agency, Sand's* case, 32 L.T. 299. *cited* in Russell and Bayley, 3rd Ed., p. 85. W

(f) If a signatory to the memorandum of association does not pay the Company for the number of shares subscribed for, he is liable to be placed on the list of contributories. The present of a paid-up share by a third party does not satisfy the obligation of a subscriber of the memorandum. 13 B. 57. X

N.B.—(i) The defendant, a past member of a Company, was sued as a contributory on the B list of share-holders. It was found that neither the notice of settlement of the B list of contributories nor notice of previous order for a call from the contributories in that list, nor notice of subsequent balance order supplemental to the call, was served properly on the defendant. *Held* that the defendant was not liable. 11 B. 241. X-1

(ii) A creditor to whom fully paid shares have been allotted in satisfaction of his debt cannot be placed on the list of contributories. *Matlock Old Bath. etc., Co., ex p. Manchester Fin. Corp.*, 29 L.T.N.S. 441=32 W.R. 41. Y

1.—“Every present... to the assets of the Company”—(Continued).

(5) Different classes of contributories.

(a) There may be one or more than one class of contributories, according as under the constitution of the Company the members are not or are as between themselves, liable in a different degree or different order; e.g., in a mutual Assurance Company there may be members holding shares and assurance members not holding shares, and the latter may be free from liability until the former are exhausted. So, there may be policy-holders who, though members, are under no liability, and if in such a Company there were also share-holders there would be members liable as contributories and members not so liable. Buckley, 9th Ed., p. 283. Z

(b) A Company carrying on the business of life and fire assurance, may have two classes of members, so that if the Company goes into liquidation there would be two classes of contributories, life contributories and fire contributories. (*Ibid.*) A

(6) Present and past members—Lists of.

The list of contributories consists of two parts—(1) a list of present members called A list, (ii) a list of past members, *i.e.*, of those who have ceased to be members within a year before the commencement of winding-up called B list. See Emden's Winding-up of Companies, 8th Ed., p. 207; Buckley, 9th Ed., p. 285. B

(7) Past member—Meaning of.

(a) A person who has legally been a member and has ceased to be such, is a past member. Buckley, 9th Ed., p. 285. C

(b) The ‘term past members’ therefore includes all persons whose shares have been forfeited, surrendered, cancelled or transferred within the year and subsequently forfeited by the transferee. All such persons are liable to be placed on the B list. *Creyke's case*, 5 Ch. 63; *Marshall v. Glamorgan Iron Co.*, 7 Eq. 129; *Bath's case*, 8 C.D. 334; *Bridger's and Neill's cases*, 4 Ch. 266; see, also, 1 N.W.P. 190, 192. D

(c) In the case of transfers, if the transfer has not been completed by registration, the transferor remains a member and must be placed on the A list. See *Gore-Browne and Jordon*, 30th Ed., p. 428. E

(d) But, if the transfer has been completed by registration, within one year before winding-up, the transferor should be placed on the B list, though the shares have in the meantime been forfeited. *Badger and Neill's case*, 1869, 4 Ch. 266. F

(e) A cancellation or forfeiture under a power in the articles would not affect the past liability of the member. *Marshall v. Glamorgan Iron Co.*, 7 Eq. 129, 138. G

(f) Thus, where the Directors cancelled certain shares allotted by them, it being doubtful whether the shares were legally created or not, the Court while upholding the compromise found that the shares were legally created and held the former holders of the cancelled shares liable as past members. *Bath's case*, 8 Ch. Div. 334. H

1.—“Every present....to the assets of the Company”—(Continued).

- (g) But, if a person who has become a member under a contract that was void *ab initio*, has avoided it before winding-up, he is in the same position as if he had never been a member, and is not liable as a past member. *Wright's case*, L.R. 7 Ch. 55. I
- (h) A member whose shares have been forfeited is as much a past member as a member whose shares have been surrendered or transferred and, therefore, if the period when his interest with the Company was determined by the forfeiture be within one year from the commencement of winding-up, he cannot escape the liability imposed upon him by the Act. 1 N.W.P. 190, 192; *Creyke's case*, 5 Ch. 63; *Marshall v. Glamorgan Co.*, 7 Eq. 129. J
- (i) Thus, if A forfeit his shares within a year before winding-up or if A transfer to B within the year and B forfeit the shares, A is liable as a past member. (*Ibid.*). See, also, *Bridger's and Neill's cases*, 4 Ch. 266. K
- (j) A provision in the articles that forfeiture shall extinguish all rights in shares would not relieve the former holder of a forfeited share of his liability to be placed on the B list. *Bridger's and Neill's cases*, 4 Ch. 266; *Creyke's case*, 5 Ch. 63. L
- (k) Cl. (d) does not exempt the former holder of forfeited shares from his liability to pay the amount, “if any, unpaid”; forfeiture is not payment. *Bridger's and Neill's cases*, 4 Ch. 266. M
- (l) In cases of forfeiture and cancellation there may be no person liable as a present member for shares. But this makes no difference in the past member's liability. Buckley, 9th Ed., p. 285. N
- (m) The former owner of forfeited shares is not liable as a present member, though the articles provide that notwithstanding forfeiture, the member shall be liable to pay calls owing on such shares at the time of the forfeiture. *Knight's case*, 2 Ch. 321; *Bath's case*, 8 Ch. Div. 334; *Needham's case*, 4 Eq. 185. See, also, *Webster's case*, 11 W. R. 226 = 7 L.T. 618 = 32 L.J. Ch. 135. O
- (n) But, in such a case the member can be sued for past calls even after the expiration of one year from the date of forfeiture. *Ladies' Dress Association v. Pulbrook*, (1900) 2 Q.B. 376. See, also, Buckley, 9th Ed., p. 284. P
- (o) In the absence of such provision he cannot, after forfeiture be sued for past calls. *Stocken's case*, 3 Ch. 412, 415, cited in Buckley, 9th Ed., p. 284. Q
- (p) Any sum recovered from him will *pro tanto* relieve a member to whom the shares are subsequently allotted, from his liability to calls. *Randt Gold Co.*, (1904) 2 Ch. 468. R
- (q) The holders of shares forfeited more than one year before the commencement of winding-up cannot be placed on the list even if they remain liable for calls made before the forfeiture. *Needham's case*, (1867) 4 Eq. 135; *Ladies' Dress Association v. Pulbrook*, (1900), 2 Q.B. 376. S
- N.B.—(i) But, if a forfeiture or surrender is invalid, mere lapse of time would not render it valid. *Esparto Trading Co.*, (1879) 12 Ch. D. 191; *Bombay's case*, (1881) 16 Ch. D. 681; *Bellerby v. Rowland & Marwood's Steamship Co.*, (1902) 2 Ch. 14. T

1.—“Every present....to the assets of the Company”—(Continued).

- (ii) Neither the Company nor the liquidator can, under the common form of articles, annul a forfeiture, for the purpose of making the member a contributory. *Re Exchange Trust*, (1903) 1 Ch. 711; *Dave's case*, (1868), 6 Eq. 232, cited in *Gore-Browne and Jordon*, 30th Ed., p. 427.

(8) Successive transfers of same shares—Effect of. U

- (a) Where there have been successive transfers of the same shares within the year before winding-up, all the transferors are liable to be placed on the B list. *Humby's case*, 20 W. R. 714 = W. N. (1872) 126 = 26 L.T. 936. Y

- (b) In the case of successive transfers of the same shares the liquidator may proceed against the mesne-transferors in preference to the ultimate one or against them all. *Kellock v. Enthoven*, L.R. 9 Q.B. 241. W

- (c) Thus, if X transfer to Y, and Y to Z, both transfers having been made within one year before winding-up, both X and Y are past members and are liable to be placed on the B list. Though as between themselves X is not liable until Y has been exhausted, there is no reason why the liquidator may not make a simultaneous call upon both X and Y, or why he should not pass over Y and make a call upon X alone. In either case X has his remedy against Y and can call upon him for indemnity. See *Kellock v. Enthoven*, L.R. 9 Q.B. 241, 247; *Humby's case*; 26 L.T. 936 = 20 W.R. 718 = 1872 W.N. 126. See, also, *Buckley*, 9th Ed., p. 286. X

(9) Successive transfers of different shares.

Though each transferee is entitled to indemnity from his transferee, no transferor can claim any equity against the holder of other shares. Thus, if W and X being the holders of different shares have, within a year before winding-up, transferred their shares to Y and Z, respectively, W's transfer being earlier in date than X's, W cannot require that X's liability shall be exhausted before W is called upon. There is no rule that one class of B contributories must be exhausted before an earlier class of B contributories can be called upon. *Morris's case*, 7 Ch. 200 = 8 Ch. 800. See, also, *Buckley*, 9th Ed., p. 286. Y

(10) Effect of transfer after winding-up, on liability to contribute.

- (a) Where, after the commencement of winding-up, a transfer is made with the sanction of the liquidator under S. 175, *infra*, or with that of the Court under S. 197, *infra*, the transferor is relieved from liability as a present member, and is only liable to be placed on the B list. *Taylor, Phillips and Richard's case*, (1897) 1 Ch. 298. Z

- (b) But, if the transfer is made without such sanction, the register will only be rectified on strong grounds. *Onward Building Co.*, (1891) 2 Q.B. 463. A

- (c) Where, after winding-up successive transfers of the same shares are made with such sanction, the last transferee alone will be placed on the A list, the transferor and all the prior transferees will be placed on the B list. *Taylor, Phillips and Richard's case*, (1897) 1 Ch. 298. B

(11) Past member of unregistered company, liability of, on registration.

The past member of an unregistered company does not if the company is registered after he has ceased to be a member, become liable as a past member of the registered company. *Lanyon v. Smith*, 2 N.R. 118; 3 B. & S. 988; *Harvey v. Clough*, 2 N.R. 204. C

1.—“Every present....to the assets of the Company”—(Concluded).

(12) Evidence necessary to settle list of B contributories.

- (a) S. 147, *infra*, provides that as soon as may be after making an order for winding-up, the Court shall settle a list of contributories. But the B list cannot be settled unless it appears that the existing members are unable to satisfy the contributions required. *Wright's case*, 12 Eq. 334 (n), 335 (n); *McEwen's case*, 6 Ch. 582; *Needham's case*, 4 Eq. 135. D
- (b) Before settling the B list it must further be shown that at the time of winding-up there was some debt or liability contracted before the past member ceased to be a member, and in the case of a limited company, that the shares were not fully paid up. *Contract Corp., Weston's case* 12 Eq. 1; *Natal Investment Co., Neville's case*, 6 Ch. 43. E
- (c) In settling the list the Court will act upon reasonable evidence without looking into minute details, and will act on the liquidator's estimate if it is not shown to be wrong. *Helbert v. Banner*, L.R. 5 H.L. 28 = 6 Eq. 509. F
- (d) The Court will not stop to consider in every case whether the present holder of shares in respect of which the past holder is put on the list will ultimately pay the amount, if any, unpaid and so leave the past holder after all liable to contribute nothing. For, putting a man's name on the list does not conclusively show that he will ultimately have something to contribute. *Andrew's case*, 4 Eq. 458 = 3 Ch. 161, cited in Buckley, 9th Ed., p. 296. G

N.B.—As there is only one list of contributories as past members all persons who ceased to be members within the year before the commencement of winding-up will be placed on the list as soon as it appears that the contributions of the present members are insufficient. *Land Credit of Ireland, Humby's case*, 26 L.T. 936 = 20 W.R. 718. H

(13) Assets—Meaning of.

The word “assets” in the section means all unpaid capital recoverable, as well as the other property of the Company. *Webb v. Whiffn*, L.R. 5 H.L. 711. I

2.—“No past member....commencement of winding-up.”

(1) Past member, when liable.

- (a) Before a past member can be held liable as a contributory it must be established that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act, and that the debts in respect of which he is called upon to contribute were incurred prior to the date on which he ceased to be a member of the company. 1 N.W.P. 190 (192). See clauses (b) and (c). J
- (b) No B contributory is liable until all the A contributories are exhausted; it is the A contributories that are primarily liable for every thing. Buckley, 9th Ed., p. 287. K

(2) Winding-up—Commencement of.

- (a) The winding-up of a company by the Court commences at the time of the presentation of the petition for the winding-up. See S. 133, *infra*. K-1

2.—“No past member....commencement of winding-up”—(Concluded).

(b) A voluntary winding-up commences at the time of the passing of the resolution authorizing such winding-up, and if the winding-up is in pursuance of a special resolution, it commences at the time of the passing of the confirmatory resolution. See S. 174, *infra*. L

(c) If after a voluntary winding-up, a compulsory order is made, the date of the commencement of the winding-up is the date of the presentation of the petition and not the date of the voluntary resolution for winding-up, and persons who have ceased to be members for more than one year from the date of the petition cannot be placed on the B list. See *Taurine Co.*, 25 C.D. 118. M

3.—“No past member....he ceased to be a member.”

(1) Measure of liability of B contributories.

(a) The measure of liability of A contributories is one only, *viz.*, the full amount unpaid on their shares, whereas the measure of the liability of B contributories is two-fold; *viz.*, (i) the amount left unpaid by the corresponding A contributories respectively, and (ii) the amount of the debts or liabilities contracted before the time that each B contributory ceased to be a member, and remaining unpaid or unsatisfied. *Buckley*, 9th Ed., p. 287. N

(b) The liability of B contributories is confined to (i) the amount remaining unpaid on their shares after exhausting all means of obtaining payment in respect thereof from the present holders of them, *cl. (c)*, (ii) the *residuum* of the debts contracted before they ceased to be members after deducting the amount paid in discharge of those debts by the A contributories, whose contributions, as part of the assets of the company are, subject to the question of costs, to be applied *pari passu* in discharge of all the company's debts, irrespective of the time at which such debts were contracted. *Brett's case*, 6 Ch. 800=8 Ch. 800, *cited in Emden's Winding-up of Companies*, 8th Ed., p. 203. O

N.B.—(i) If the past members, before call made, buy up all the debts for which they are liable, or if such debts are released or extinguished, they cannot be placed on the list. (*Ibid.*)

(ii) Though past members are not liable for debts contracted after they ceased to be members, they are liable for debts contracted before they became members. *Helbert's case*, 6 Eq. 509. P

4.—“No past member....of this Act.”

(1) Relation of present members to past members.

(a) The relation of a present member to a past member is not that of a principal debtor to his surety. Their relation is one of primary and secondary liability. *Helbert v. Banner*, L.R. 5 H.L. 28; *Roberts v. Crow*, L.R. 7 C.P. 629. Q

(b) Hence, a past member is not discharged from liability as a contributory by a compromise made by the liquidator with a present member under S. 202, *infra*, whether with or without reservation of rights as against other contributories. *Nevill's case*, 6 Ch. 43; *Hudson's case*, 12 Eq. 1; *Helbert v. Banner*, L.R. 5 H.L. 28. R

4.—“No past member....of this Act”—(Concluded).

- (c) Nor does such compromise release the present member from his implied contract to indemnify the past member for what he may have been called upon to pay. *Roberts v. Crowe*, L.R. 7 C.P. 629. S

N.B.—The same rule holds good as between a past member of an earlier date and a past member of a later date. Thus, if within the year X had transferred to Y, and Y to Z, and Z failing to pay calls as a present member, X and Y are made contributories as past members, X is entitled to indemnity from Y, for anything which X had been compelled to pay. *Kellock v. Enthoven*, L.R. 8 Q.B. 241; *Murton v. Bigham*, 1873 W.N. 226.

(2) B contributory's liability for costs of winding-up.

- (a) A, B contributory's liability for costs is limited to such costs and adjustment of moneys (if any) as may be properly incident to or consequent upon calling on them for contributions in respect of what may be called the “old” debts. See *Per Lord Selborne in Brett's case*, 8 Ch. 800; *Marsh's case*, 13 Eq. 888. T
- (b) If such debts have been extinguished, a B contributory cannot be placed on the list with a view to make him liable for costs. *Brett's case*, 8 Ch. 800. U
- (c) “It is only because he is found on the list as a person liable to pay some of the debts that a jurisdiction to make him contribute to the costs would arise.” *Per Lord Cairns in Clarke's case*, (Alb. Arb.), 16 Sol.J. 554; see, also, *Michael Brown's case*, (Eur. Arb.) Reil. 32=L.T.21=17 Sol.J. 310. See, however, *Davies' case* (Eur. Arb.) L.T. 80=17 Sol.J. 670. V

5.—“In the case....past member.”

(1) Scope of clause (d).

- (a) Where the company in liquidation is a company limited by shares, this clause, expressly prescribes the limit of a member's liability; a member cannot be called up to contribute more than the amount unpaid upon his shares. See *Buckley*, 9th Ed., p. 282. W
- (b) Any provision in the memorandum of association or the articles, which has the effect of making a member liable in respect of his share-holding far more than the amount of his shares is contrary to the provisions of the Act, and is *ultra vires*. *Bisgood v. Henderson's Estates*, (1908), 1 Ch. 743, 759. X

N.B.—But in spite of this clause and clause (e), *infra*, if, in order to provide for the payment of a particular debt, the liability of a share-holder of a limited Company is, by the articles of association, extended beyond the limit fixed by the memorandum, then, so long as the debt remains undischarged the member's liability continues, though the shares held by him have been fully paid up. See *Maxwell's case*, 20 Eq. 585.

(2) Fully paid share-holder—Whether a contributory.

- (a) The holder of fully paid shares, even though he is a debtor to the Company cannot be placed on the list of contributories, but he is a contributory for purposes of presenting a petition to wind-up the Company. See *Marlborough Club Co.*, 5 Eq. 365; *Schroder's case*, 11 Eq. 131; *Nat. Sav. Bank. Assn.*, 1 Ch. 547. Y

5.—“In the case....past member”—(Continued).

- (b) After the debts of the Company have been paid calls may be made for the purpose of adjusting the rights of the contributories among themselves, and for this purpose, the holders of fully paid shares must be deemed contributories. *Anglesea Colliery Co.*, (1866) 1 Ch. 555; *E.P., Maude*, (1871), 6 Ch. 51. Z
- (c) Their names may be retained on the register also in respect of their liability to costs of winding-up. *Davies' case*, 17 Sol. J. 670. A

(3) Rules as to contributions and their application.

Buckley has thus summarised the rules which have been established with respect to the contributories of a Company in liquidation and the application of their contributions :—

- I. The A contributories are primarily liable for every thing, and must be first individually exhausted before any B contributory can be called upon. See cl. (c), *Morris' case*, 7 Ch. 200. B
- II. The assets of the Company including the A contributions, are first (subject to the questions of costs) to be applied in payment *pari passu* of all the debts of the Company irrespective of the time at which such debts were contracted. *Morris' case*, 7 Ch. 200=8 Ch. 800; *Webb v. Wiffin*, L.R. 5 H.L. 711. See, also, S. 177, *infra*. G

III. THE LIABILITY OF A B CONTRIBUTORY IS LIMITED BY :—

- (i) The amount left unpaid on his shares by the corresponding A contributory. See cl. (d). D
- (ii & iii) Such *residuum* of the debts contracted before he ceased to be a member as remains undischarged when Rule II has been complied with. *Morris' case*, 7 Ch. 200=8 Ch. 800; *Webb v. Wiffin*, L.R. 7 H.L. 711. E
- (iv) The contributions of B contributories form part of the general assets of the Company irrespective of the time at which such debts were contracted. *Accidental and Marine Insurance Co.*, 5 Ch. 428; *Webb v. Wiffin*, L.R. 7 H.L. 711. F
- (v) If, before a call is made upon the B list, or before payment of such call the debts in respect of which a B contributory was, having regard to cl. (b), liable to contribute, or any of them, are in any manner released or extinguished in whole or in part, his liability to contribute to the assets of the Company is (subject to any question as to the costs of the winding-up) thereby *pro tanto* discharged. G
- (vi) The liability of a B contributory to contribute to the costs of the winding-up is confined to such costs as have been occasioned by the necessity of calling upon him for contributions in respect of debts. *Brett's case*, 6 Ch. 800=8 Ch. 800; *Marsh's case*, 18 Eq. 388. H
- (vii) B contributories of later date are not to be exhausted before calling upon B contributories of earlier date. Upon the failure of the A contributories to satisfy their measure of liability, leaving B debts unsatisfied, all past members liable under clauses (a) and (b) become simultaneously liable to contribute. *Morris' case*, 7 Ch. 200=8 Ch. 800. H-1

Successive transferors of the same shares may also, it seems, be called upon simultaneously, but in this case each transferor will have a right to be indemnified by his transferee. *Kellock v. Enthoven*, L.R. 9 Q.B. 241, 247. I

5.—“*In the case....past member*”—(Concluded).

(4) Effect of the rules as regards B creditors.

Suppose that all B contributories have left the Company at the same time, that B debts unpaid at the winding up are £4,000, and A debts (those contracted after the B contributories ceased to be members) are £16,000. Suppose that the assets of the Company including A contributions suffice to pay 15s. in the pound. By this payment B debts will be reduced to £1,000, and A debts to £4,000 (See Rule II). Then, by Rule V, the amount of contributions that B contributories can be required to contribute would be only £1,000, and this sum will by rule IV form part of the general assets of the Company and will go to reduce B debts to £900, and A debts to £3,200. “We have this singular result” says Buckley “that although there are B debts left unsatisfied, and B contributories whose liability as measured by the limit of their shares, is unexhausted, the creditors can obtain no further dividend.” Buckley, 9th Ed., p. 291. J

6.—“*Nothing in this Act....of such policy contract.*”

Scope of cl. (f).

By this clause an unlimited Company can limit the liability of its members by a special contract as for instance, in *Lethbridge v. Adams*, 13 Eq. 547. See, also, *Accidental Death Insurance Co.*, 7 Ch. D. 568; *Great Britain Mutual Life Assurance Society*, 16 Ch. D. 247. K

7.—“*No sum....member of the Company.*”

(1) Object of cl. (g).

This clause is introduced by way of analogy to the law of partnership. A debt due to a partner cannot be proved in competition with outside creditors when the partnership is dissolved. *Dale and Plant*, 43 Ch. D. 255. L

(2) Fees of directors whether postponed to debts of outside creditors.

(a) Where the articles of a Company required the directors to be members, held a director's unpaid fees were a debt due to him in his character of member, and must be post-poned to outside creditors. *Leister Club*, *E. P.*, Cannon, 30 Ch. D. 629. M

N.B.—This decision went on the ground that under the articles the directors were at the mercy of the Company as to whether they should have any, and if any, what remuneration, and accordingly where directors are appointed by a Company on the footing of the articles which entitle them to remuneration, their remuneration is not debt due to them in their character of members, but they are ordinary creditors for it. *E. P. Beckwith*, (1898), 1 Ch. 324; *A. I. Biscuit Co.*, (1898), W.N. 155; *Dover Coalfield*, (1907), 2 Ch. 76 = (1908) 1 Ch. 65, cited in Buckley, 9th Ed., p. 282.

(b) Payment to a person for special skill and attention is none the less a payable debt because the person is a director, and, under the articles, a director should be a share-holder. *Dale and Plant*, 43 Ch. D. 255. N

(3) Damages for improper forfeiture.

A person who claims damages for improper forfeiture of his shares claims not as a member, but as a non-member, and is entitled to prove as a creditor. *New Chile Co.*, 45 Ch. D. 598. O

7.—“No sum....member of the Company”—(Concluded).

(4) ‘Or otherwise,’ meaning of.

- (a) These words mean something analogous to dividends or profits on the members' shares and cannot include money due for goods which a member has supplied to the Company, nor payment for particular work which he has special skill in doing and which he has done for the Company. *Per Kay, J. in Dale and Plant*, 43 Ch. D. 255, 259. P
- (b) If a member who claims damages for the issue to him of shares not fully paid when he contracted to take fully paid shares, his proof will fall within the words ‘or otherwise.’ *Addlestone Linoleum Co.*, 37 Ch. D. 191, 198. Q

8.—“The liability of past members....equal rights.”

Scope of Explanation.

- (a) This Explanation adopts the rule laid down by the House of Lords in *Webb v. Whiffin* (L.R. 5 H.L. 711), viz.—Though a past member cannot be called upon to contribute in respect of a debt or liability of the Company contracted after he ceased to be a member, still, the funds contributed by the B contributories form part of the general assets of the Company and should be applied in payment of all the debts of the Company, and are not to be applied, preferentially or exclusively, to the payment of those debts which were incurred before the B share-holders retired from the Company.
- (b) In other words, there is no division of creditors into classes with different rights against the funds, and consequently no marshalling between them. *Emden's Winding up of Companies*, 8th Ed., p. 209. R
- N.B.—Clause (b), *supra* is a rule of contribution and not a direction as to distribution. *Webb v. Whiffin*, L.R. 5 H.L. 711.

Miscellaneous.

(1) Suits by Company and those by liquidator—Limitation.

A suit by a Registered Company against a share-holder for the amount of calls on the shares taken by him is governed by Art. 112, Limitation Act, but a suit by the liquidator, after winding-up, is governed by Art. 120. 10 B. 483 (487). S

(2) Insolvency of Contributories—Effect of.

- (a) In the case of the insolvency of any contributory, the liquidator may prove against his estate the estimated value of his liability to future calls, as well as to calls already made. See S. 125, *infra*. T
- (b) If a past member whose name is placed on the B list becomes a bankrupt, after the commencement of the winding-up, his liability to the Company can be proved as a debt in his bankruptcy, and the bankrupt, after obtaining his discharge, is entitled to be removed from the list of contributories. *Land Credit Co. of Ireland*; *McEwen's case*, 6 Ch. 582. U

62. With respect to the contributions to be required in the event of the winding-up of a limited Company from any director or manager whose liability is unlimited¹, the following modifications shall be made in the last preceding section:—

Liability of director or whose liability is unlimited.

- (a) subject to the provisions hereinafter contained, any such director or manager, whether past or present, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to contribute as if he were at the date of the commencement of such winding-up a member of an unlimited Company :
- (b) no contribution required from any past director or manager who has ceased to hold such office for a period of one year or upwards prior to the commencement of the winding-up shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the Company :
- (c) no contribution required from any past director or manager in respect of any debt or liability of the Company contracted after the time at which he ceased to hold such office shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the Company :
- (d) subject to the provisions contained in the regulations of the Company, no contribution required from any director or manager shall exceed the amount (if any) which he is liable to contribute as an ordinary member, unless the Court thinks it necessary to require such contribution in order to satisfy the debts and liabilities of the Company, or the costs, charges and expenses of the winding-up.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 32, sub-secs. (2) & (3) of the English Companies (Consolidation) Act of 1908. The English Act contains the word "and" instead of the word "or" before the words "the costs, charges and expenses of the winding up."

Y

I.—"Any director.....is unlimited."

Liability of directors, etc.—When may be unlimited.

Under S. 7, *supra*, the liability of the directors or managers or of the managing director of a limited Company, may, if so provided by the memorandum of association, be unlimited.

But even where the memorandum does not so provide, the Company, if so authorized by its regulations, may, by special resolution, alter its memorandum so as to render unlimited, from and after the date of such resolution, the liability of its directors, managers, or of the managing director. See S. 76, *infra*.

W

PART III.

MANAGEMENT AND ADMINISTRATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Provisions for Protection of Creditors.

63. Every Company under this Act shall have a registered office¹ to which all communications and notices may be addressed². If any Company under this Act carries on business without having such an office, it shall incur a penalty not exceeding fifty rupees for every day during which business is so carried on.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 62, cls. 1 & 2, Companies (Consolidation) Act, 1908. The penalty fixed by the English Act is five pounds *per diem*, whereas under the Indian Act, it is fifty rupees *per diem*. X

1.—“Registered Office.”

(1) Registered office—Necessity.

Every company must have a registered office. See Halsbury, Vol. V, p. 82. Y

(2) Domicile of the company—Registered office outside jurisdiction—Effect.

A company is not domiciled or ordinarily resident in England when, though it may have agencies and its chief office there, its registered office and secretary are outside the jurisdiction. *Jones v. Scottish Accident Insurance Co.*, 17 Q.B.D. 421. Z

(3) The position of the officer.

(a) The position of the office fixes the country in which the Company is to be registered. Halsbury, Vol. V, p. 83. Vide S. 64, *infra*. A

(b) To some extent, the situation of the office points out where the domicile of the Company is, and it is important as regards the Court which has the jurisdiction to wind up the Company. Halsbury, Vol. V, p. 83. B

(4) Principle governing determination of Company's residence.

The principle is, not that the registered office is necessarily the Company's residence, but that in such a case, it is the place where the central management and control actually abide. *De Beers Consolidated Mines, Ltd. v. Howe*, A.C. 1906, 455 (458). See, also, Buckley, on Companies, 9th Ed. p. 155 and cases *cited* therein. C

(5) Residence of Company—Test.

(a) The test for determining its residence is whether the Company is conducting its own business at some fixed place within its jurisdiction. *La Bourgogne*, 1899, p. 1; *Cie Generale v. Law*, 1999 A.C. 431. D

(b) If it is, then, so long as it is so conducting business (even if it be for a very short time, e.g. nine weeks at a motorcar show at the Crystal Palace), it is resident there. *Haggin v. Comptoir d'Escompte*, 23 Q.B.D. 521. E

1.—“Registered office”—(Concluded).

- (6) Existence of registered office at one place—Domicile or residence also at other places, not excluded.

Assuming, as may generally be the case, that a Company resides at the place of incorporation, or at the place of its registered office, it does not follow that it does not also reside elsewhere. It may have more than one residence and one domicile. *Corron Iron & Co. v. Maclaren*, 5 H.L.C. 416, 449 (458); *La Bourgogne*, 1899, P. 1 (16). F

- (7) Foreign Corporation—Residence.

A foreign corporation, which establishes an office in England and carries on a principal part of its business there, is resident there. *Haggin v. Comp-toir d'Escompte*, 23 Q.B.D. 521. G

- (8) Foreign corporation—Residence—Test.

It does not follow that merely because a foreign corporation has an office at a particular place or it has property there or that a large number of its share-holders reside there, that it is resident there. The question is one of fact whether it really has a business existence there. *Badcock v. Cumberland Gap Co.*, (1893) 1 Ch. 362. H

- (9) Residence for taxing purposes.

The position of a Company's registered office, though it does not necessarily determine its residence is an important factor in determining where its residence is. *Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428. I

- (10) *Ibid.*—Test.

The material question for the purposes of taxation is not where the profits are earned, but where the trade is carried on. *London Bank of Mexico v. Apthorpe*, (1891) 1 Q.B. 383; 2 Q.B. 378; *San Paulo Brazilian Railway v. Carter*, (1895) 1 Q.B. 580; (1896) A.C. 31. J

- (11) Foreign Company—When liable to be taxed.

A foreign Company which makes profits out of contracts of affreightments wholly affected in England, is chargeable with income tax in England on those profits. *Wingate v. Commissioners of Inland Revenue*, (1898) W.N. 129; see *Erichson v. Last*, 7 Q.B.D. 12; 8 Q.B.D. 414 and *Giberton v. Fergusson*, 5 Ex.D. 57=7 Q.B.D. 562; Buckley, 9th Ed., p. 156. K

- (12) Foreign trader who merely canvasses orders in England.

A—, through agents there, but makes all sale contracts and all deliveries abroad, does not exercise a trade in England. *Granger v. Gough*, (1896) A.C. 325; but see *Watson v. Sandie*, (1898) 1 Q.B.D. 326. L

2.—“To which all communications.... may be addressed.”

- (1) Process, service of.

All communications and notices may be addressed to the Company at its registered office, and a document may be served on it by leaving it or sending it by post to the registered office. See C.P.C., 1882, S. 436. (=0 XXIX r. 2, C.P.C., 1908). M

- (2) Service of summons—Applicability of S. 436, C.P.C., 1882 (=0 29, r. 2, C.P.C. 1908).

The service of a summons on a Company registered under the Companies Act is regulated by S. 89, Act VI of 1882 and S. 436, C.P.C., 1882, does not apply to such Companies. 12 Bom.L.R. 730. N

2.—“To which communications.... may be addressed”—(Concluded).

(3) Process in a Criminal case.

A summons to appear before a Magistrate must be served at the registered office. *Pearks, Gunston, and Tee, Ltd. v. Richardson*, (1902) 1 K.B. 91. O

(4) Mode of service.

Service need not be by post; the document may be left with a director at the office. *Watson v. Sheather Sons & Co.*, (1886) 2 T.L.R. 473. P

(5) Service on solicitor.

Service on the solicitor of a Company is only sufficient where the Company agrees to accept it and enters appearance. *Re Denner United Breweries, Ltd.*, (1890) 63 L.T. 96. Q

(6) Service on foreign corporation.

(a) Where a foreign corporation is lessee of an office at a particular place, where its name is painted up, service at such an office on a person who acts on its behalf is good service on the company. *Compagnie Generale Transatlantique v. Law*, 1899 A.C. 431. R

(b) But, if, at such a place, it has only an agent's office and not the company's office, and no person in the company's service could be found there, then service at such a place will not bind the company. *Princess Clementine*, 1897 p. 18. But see 1899 A.C. 431. noted *supra*. S

(7) Service, in the absence of registered office.

Where there is no registered office, service at the office, in fact used by the company will be sufficient. *Re British and Foreign Gas Generating Apparatus Co.*, (1865) 13 W.R. 649; *Re Fortune Copper Mining Co.*, (1870) L.R. 10 Eq. 390. T

(8) Cessation of business by Company.

Where there is no office, the company, though not dissolved, has practically ceased to carry on business, service on some of the late officers may be allowed. *Gaskell v. Chambers*, 26 Beav. 252=5 Jur. N.S. 52=28 L.J. Ch. 385. U

(9) Waiver of service.

The secretary may waive service on him at the registered office by requesting that it may be served on him elsewhere. *Re Taylor ex parte Railway Steel and Plant Co.*, (1878) 8 Ch. D. 163, 189, 190; but see, *Wood v. Anderston Foundry Co.*, 36 W.R. 918. Y

(10) Appearance by solicitor, when not waiver of service.

An appearance by a solicitor to raise a point of substance only is not a waiver of the objection. (*Ibid.*) cited in Halsbury, Vol. V, p. 83. W

64. Notice of the situation of such registered office¹ and of any change therein shall be given to the Registrar and recorded by him. Until such notice is given, the Company shall not be deemed to have complied with the provisions of this Act with respect to having a registered office.

Notice of situation of registered office.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 62 (2) of the Companies (Consolidation) Act, 1908. X

1.—“Situation of such registered office.”

Vide notes under S. 63, *supra*, under the heading 1. ‘Registered Office.’

65. Every limited Company under this Act whether limited by

Publication of
name by a limited
Company.

shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the Company is carried on, in a conspicuous

position, in letters easily legible, in the English language, and also, in the registered office be situate in a district beyond the local limits of the ordinary original civil jurisdiction of a High Court, in one of the vernacular languages used in such district, and shall have its name engraven in legible characters in such language or languages on its seal, and shall have its name mentioned in legible characters in the English language in all notices, advertisements and other official publications of such Company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods¹ purporting to be signed by or on behalf of such Company, and in all bills of parcels, invoices, receipts and letters of credit of the Company.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 63, cl. 1 of the English Companies (Consolidation) Act, 1908. Y

1.—“Shall have its name mentioned....in all notices....goods.”

(1) Provision regarding mention of Company's name—Construction.

The provision that the name of the Company must be mentioned in all bills of exchange, promissory notes, cheques, etc., has been strictly construed, so that if the name is incorrectly given the person signing will be personally liable. *Atkins & Co. v. Wardle*, (1889) 58 L.J.Q.B. 377; 61 L.T. 23; *Wassau Steam Press v. Tyler*, (1894) 70 L.T. 376. See, also, Buckley, 9th Ed., p. 157. Z

(2) Omission to mention ‘limited’ in the name of Company written on a bill—Effect.

The secretary of a limited Company who had accepted a bill directed to the Company in which the word ‘limited’ was omitted was held personally liable on the bill, the same not having been paid by the Company, (*Ibid.*), *Penrose v. Martyr*, E.B. & E. 499=28 L.J.Q.B. 28=5 Jur. N.S. 362. A

1.—“*Shall have its name mentioned....in all notices....goods*”—(Cld.).

(3) Name of the Company, use of—Litigation.

(a) As regards the name of a Company in litigation, an action to prevent or redress a wrong done in a matter *intra vires*, must be brought in the name of the company, and the litigation will not be allowed unless the Court is satisfied that the majority of share holders desire it. *Mac Dougell v. Gardiner*, 1 Ch. D. 13; *Normandy v. Ind. Coope & Co.*, (1908) 1 Ch. 84. B

(b) But a single share-holder may sue on behalf of himself and all other share-holders, or as representing the minority, making the Company a defendant, and may obtain an injunction to restrain the Company and the directors from doing any act which is illegal, fraudulent or *ultra vires*. *Hope v. International Financial Society*, 4 Ch. D. 327; *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56; *Menier v. Hooper's Telegraph Works*, 9 Ch. Ap. 350; *Burland v. Earle*, (1902) A.C. 83. C

66. If any limited Company under this Act does not paint or affix, and keep painted or affixed, its name ¹ in manner directed by this Act, it shall be liable to a penalty not exceeding fifty rupees for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed.

Every director and manager of the Company who knowingly and wilfully authorises or permits such default shall be liable to the like penalty.

If any director, or manager, or officer ² of such Company, or any person on its behalf, uses or authorises the use of any seal ³ purporting to be a seal of the Company whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement or other official publication of such Company or signs or authorises to be signed on behalf of such Company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the Company wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty of one thousand rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods for the amount thereof, unless the same is duly paid by the Company.

(Notes).

General.

Corresponding English Law.

This section corresponds to the Companies (Consolidation) Act, 1908, S. 62 (2),

(3).

D

1.—“*Its name.*”

Improper use of name by others—Remedy by injunction.

If a limited Company purchase a business and continue the use of the vendor's firm name which is not the Company's corporate name or establish a business under a firm name which is not their corporate name, they may obtain an injunction to prevent others from using that firm name so as to deceive, and none the less because the Company in trading in that name may have contravened this section. Buckley, 9th Ed., p. 157 and *Pearks Lim v. Thompson*, 18 R.P.C. 185; *Randall Lim v. British Shoe Co.*, (1902) 2 Ch. 354 cited therein. E

2.—“*Officer.*”

Solicitor, whether officer of Company.

A solicitor is not generally an officer of the Company so as to make him liable for misfeasance proceedings [*In re Great Western Coal Consumer's Co.*, *Carter's case* (1886), 31 Ch. D. 496], so long as he has acted as solicitor in the usual way. See Evans and Cooper, p. 67. F

3.—“*Seal.*”

(1) **Seal—Custody of.**

Those responsible for managing the business of the Company have the right to use the seal, unless the articles otherwise provide, and the directors are usually the persons to do so. Evan and Cooper, p. 67. G

(2) **Director's duty as to keys of seal.**

The directors should also provide by resolution for the keys of the seal. Evans and Cooper, p. 67. H

(3) **Mode of attesting use of the seal.**

If the articles do not provide how the use of the seal is to be attested, the directors should decide; usually it is provided that the seal shall only be affixed in the presence of two directors. Evans and Cooper, p. 67. I

(4) **Affixing of seal—Sufficiency to bind Company.**

A director signing must state on the face of the document that he is acting for the Company. Otherwise he will be personally liable, though the Company's seal is affixed. *Dutton v. Marsh*, 6 Q.B. 361; but See *Chapman v. Smethurst*, (1909) W.N. 65. J

Contracts.

Contracts how made. 67. Contracts ¹ on behalf of ² any Company under this Act may be made as follows (that is to say):—

- (a) any contract, which if made between private persons would be by law required to be in writing, and if made according to English Law, to be under seal³, may be made on behalf of the Company in writing under the common seal of the Company; and such contract may be in the same manner varied or discharged:

- (b) any contract, which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith, may be made on behalf of the Company in writing signed by any person acting under the express or implied authority of the Company; and such contract may in the same manner be varied or discharged:
- (c) any contract, which if made between private persons would be by law be valid, although made by parol only and not reduced into writing, may be made by parol ⁴ on behalf of the Company by any person acting under the express or implied authority of the Company; and such contract may in the same way be varied or discharged. And all contracts made according to the provisions herein contained ⁵ shall be effectual in law, and shall be binding upon the Company and their successors, and all other parties thereto, their heirs, executors or administrators, as the case may be.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 76, cl. 1, sub-cl. i, ii, iii, and cl. 2, Companies (Consolidation) Act, 1908. K

I.—“Contracts.”**(1) Contracts on behalf of companies, governed by ordinary law.**

The ordinary law as to contracts applies to contracts made on behalf of, or by Companies, *e.g.*, S. 4 of the Statute of Frauds, which renders certain classes of contracts unenforceable unless in writing. *Jones v. Victoria Graving Dock*, 2 Q.B.D. 314. L

(2) Estoppel by acts of agents.

A Company is liable equally with an individual, to be estopped by the acts of its agents. *Bourke v. Alexandra Hotel Co.*, 1877 W.N. 30; *ibid* 157 (C.A.). M

(3) Company, bound by acts of agent.

A Company must pay off debts contracted by its authorised agent. 6 B. 326. N

(4) Director's misrepresentations.

A Company is liable for—5 B. 92. O

(5) Unreasonable and onerous contract by managing agent—Not binding on Company.

Where an agreement entered into by the managing agents of a Company is unreasonably and excessively onerous and such as should not be entered into in the usual way and according to the ordinary course of business, it is *ultra vires*, and the Company may repudiate it. 10 P.R. 1905=100 P.L.R. 1905. P

I.—“Contracts”—(Continued).

(6) Fraud by director—Company not bound.

A Company is not bound where the contract is due to the fraudulent act of one of its directors. 129 P.L.R. 1904. Q

(7) Contracts before incorporation, how made—Mode of formation of Company.

The procedure by which promoters generally form a Company, is as follows.

The owner of the property to be taken over by the Company is asked to enter into an agreement for the sale thereof upon certain conditions to some person as trustee for the Company. The memorandum and articles of the Company are settled when this agreement, had been executed. A clause in the articles authorises the Company to adopt and carry into effect the agreement. After the incorporation of the Company the directors pass a resolution adopting the agreement, and a supplemental agreement is thereupon executed by the owner of the property, the trustee for the Company, and the Company itself by which the Company is placed on the position of its trustee, and is bound to carry the original agreement into effect. Cooper and Evans, p. 94. R

(8) Clause for rescission in pre-incorporation contract—Necessity.

Where a trustee for a company, in accordance with a common mode of formation of a company, contracts with a vendor, the trustee remains personally bound until the trustee has executed the supplemental agreement. There should therefore be a clause in the original agreement enabling the trustee to rescind it. Cooper and Evans, p. 94. S

(9) Contracts before incorporation.

An incorporated company is not bound by contracts purporting to be entered into on its behalf by its promoters or other persons before its incorporation and the person purporting to enter into such a contract is personally liable upon it. *Kelner v. Baxter*, (1866) L.R. 2 C.P. 174; *Wilson & Co. v. Baker Lees & Co.*, (1901) 17 T.L.R. 473. T

(10) Contract by promoters—Agreement to appoint plaintiff as *delal* or broker for fifteen years—Mention in Articles of Association—No ratification, adoption or new contract, after formation—Invalidity.

The promoters of an intended Company entered into an agreement with the plaintiff, on behalf of the Company to be formed, to the effect that the plaintiff was to be the *delal* or broker of the Company for a term of fifteen years and was to be remunerated by commission at a certain rate. This contract was subsequently embodied in the Articles of Association. Plaintiff sued for commission for his services as a broker. There was no evidence of the adoption and ratification of the agreement, nor of the Company's entering into a fresh contract with the plaintiff after its formation. The plaintiff was held not entitled to relief. 2 P.R. 1905 = 129 P.L.R. 1904. U

(11) Contract entered into before formation, how far binding after formation—Ratification—Adoption.

No contract can bind a Company, which has been entered into with regard to it when, as yet, it has no existence. Even if such contract is embodied in the Articles of Association, it cannot bind the Company, when formed, unless it has, after its formation, ratified and adopted it. 2 P.R. 1905 = 129 P.L.R. 1904. Y

I.—“Contracts”—(Continued).

(12) Ratification—Special resolution—Clear knowledge of subject—Proof.

Such ratification can only be established by clear proof of the fact that the share-holders had clear knowledge of the subject contract to be ratified and that a general or special meeting of the Company was summoned with the express object of considering the ratification of the particular contract. 2 P.R. 1905=129 P.L.R. (1904). W

(13) Solicitor's costs before incorporation.

A solicitor who prepares the memorandum and articles cannot recover his costs for the same from the company when incorporated. *Re English and Colonial Produce Co., Ltd.* (1906) 2 Ch. 435. X

(14) Registration fees.

Even the fees required to be paid on the registration, of the company cannot be recovered after its incorporation. *Re National Motor Mail-Coach Co., Ltd., Clenton's Claim*, (1908) 2 Ch. 515 (C.A.). Y

(15) Adoption of pre-incorporation contracts—Effect.

The adoption and confirmation by a resolution of the directors of a contract made before the incorporation of the company by persons purporting to act on its behalf does not create any contractual relation between the company and the other party to the contract, or imposes any obligation on the company towards him. *North Sydney Investment and Tramway Co. v. Higgins*, (1899) A.C. 263; *Re Johannesburg Hotel Co., Ex parte Zoutpansberg Prospecting Co.*, (1891) 1 Ch. 119 (C.A.). Z

(16) Notice or knowledge of contract imposing charge or incumbrance upon property—Effect.

But, if it has notice of a contract between the persons under whom it claims property, real or personal, of which it takes possession, and a former owner of the property, whereby a charge or incumbrance was imposed on the property, the company takes subject to the charge or incumbrance, although it is not liable as the assignee to be sued for non-performance of the terms contained in the contract other than those, as to the charge. *Werderman v. Societe Generale Electricite*, 19 Ch. D. 246 (C.A.). See, also, *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146, 157 (C.A.). A

(17) Contract before incorporation.

(a) A company cannot ratify or adopt a contract entered into by a person on its behalf before incorporation. *Kelner v. Baxter*, 2 C.P. 174 and See other cases cited on the subject in Halsbury. Vol. V., p. 297, footnote (b). B

(b) But it may enter into a new contract embodying the terms of the old one. *Re Dale and Plant*, (1889), 61 L.T. 206; *Natal Land Co. v. Pauline Colliery Syndicate*, (1904) A.C. 120. C

(c) It may also enter into a new contract adopting the original one. *Cooper and Evans*, p. 94. D

(18) New contract.

(a) A—by a company, may be inferred from the acts of the company when incorporated. *Re Empress Engineering Co.*, 16 Ch.D.(C.A.) ; *Re Patent Ivory Manufacturing Co. Howard v. Patent Ivory Manufacturing Co.*, 88 Ch. D. 156 cited in Halsbury, Vol. V, p. 297. E

1.—“Contracts”—(Concluded).

(b) But such new contract cannot be inferred except where such acts are done in the mistaken belief that such acts are binding. *Re Northumberland Avenue Hotel Co.*, 33 Ch.D. 16 C.A.; *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, (1901) 1 Ch. 1906. F

(19) Evidence, requisite to bind company.

(a) There must be evidence of a fresh agreement, between the company after its incorporation and the owner of property, in order to bind the company. *Re Northumberland Avenue Hotel Co.* *Sully's case*, 33 Ch. D. 16. G

(b) This evidence may be supplied if the directors of a company pass a resolution that the agreement be adopted, and act as if it were adopted, although no fresh agreement is executed. *Howard v. Patent Ivory Co.*, 38 Ch.D. 163. See, also, *Bagot Pneumatic Tyre Co., v. Clipper Pneumatic Tyre Co.*, (1901) 1 Ch. 196. H

(20) Effect of articles on a contract.

Where there is a written agreement the terms of the articles of association will not be imported unless they are specifically referred to. *Re Alexander's Timber Co.*, (1901) L.J. (Ch) 767. *Boston Deep Sea Fishing and Ice Co., v. Ansell*, 39 Ch. D. 339, 366 C. A. I

2.—“On behalf of.”

(1) Authority to contract on behalf of company—Directors and managers.

The authority to contract on behalf of a company may be express or implied. Directors and managers have in most companies express authority to contract on their behalf, and such authority will be implied with regard to all matters in the ordinary course of the company's business. *Cartmell's case*, 9 Ch. A. 691; *Re Cunningham & Co., Simpson's Claim*, (1887) 36 Ch.D. 532. J

(2) Director's duty—Adoption of pre-incorporation contracts.

(a) It is the duty of directors of a company which is formed to adopt a special contract to make careful and full enquiries before finally committing the company to it and to act as prudent men would act in their own business. *Overland and Gurney Co. v. Gibb*, L.R. 5 H.L. 780; *Twycross v. Grant*, 2 C.P.D. 469, 494 C.A.; Halsbury, Vol. V, p. 298. K

(b) If any corrupt inducement is afforded to the directors to adopt the contract, it will not be enforced as against the company. *Maxwell v. Port Tenant Patent Steam and Fuel Co.*, 24 Beav. 496. L

(3) Authority in usual way—Construction—Extended powers—Special authority, necessary.

Where the authority is conferred in the usual way it must be construed to be an authority to act in the usual way and according to the ordinary course of business; special phraseology alone can give more extended powers. 10 P.R. 1905=100 P.L.R. 1905. M

(4) Managing agent—Appointment by—*Mustaddi*—No submission to share-holders—Allowing to work as such—No ratification.

Where the appointment of a *mustaddi* by the managing agent of a Company was never submitted to the meeting of the share-holders of the Company, the mere fact that the person appointed was allowed to work as a *mustaddi* for some time could not be held to be either a ratification of, or acquiescence in, such appointment by the Company. 10 P.R. 1905=100 P.L.R. 1905. N

2.—“On behalf of”—(Concluded).

(5) Contract by managing agent, onerous and unreasonable—*Ultra vires*—Repudiation by Company.

Where an agreement entered into by the managing agents of a Company, is unreasonable and excessively onerous and such as should not be entered into in the usual way and according to the ordinary course of business, it is *ultra vires* and the Company is entitled to repudiate it
10 P.R. 1905 = 100 P.L.R. 1905. O

3.—“Required....under seal.”

(1) Instances of contracts required to be under seal.

(a) Contracts required in the case of individuals to be under seal are those which are made without valuable consideration, certain leases, assignments and surrenders of leases, assignments of sculpture, assignments of ships and shares in ships, and generally, transfers of shares in companies. See Halsbury, Vol. V, p. 299. P

(b) By statute, a corporation may be required to seal every contract it enters into. *Hunt v. Wimbledon Local Board*, 4 C.P.D. 48; *Brooks v. Torquay* (1902) 1 K.B. 601. Q

(2) Contract not under seal—Valid otherwise—Effect.

Apart from this section, contract entered into by a trading corporation for a purpose connected with the object for which the company was incorporated, might be enforced, though not under seal. *South of Ireland Colliery Co. v. Waddle*, L.R. 3 C.P. 463; (*ibid.*), 4 C.P. 617. R

(3) Contract required to be under seal—Liability whether can be implied.

Even, in a case where it is, by statute, required, to seal every contract, where the whole consideration for payment is executed, a contract to pay may be implied from the acts of the corporation, and an action may lie even in the absence of a contract under seal. *Lawford v. Billerica*, (1903) 1 K.B. 772. S

(4) Seal.

(a) Directors may affix the seal to any authorised document. *Clarke v. Imperial Gas Co.*, 4 B and Ad. 315. T

(b) The articles usually make provision as to the affixing of seal, though such an article may be merely directory. *Re Hansard Publishing Union Ltd.*, (1892) 8 T.L.R. 280 (C.A.); *Land Owners West of England and South Wales etc., Co. v. Ashford*, 16 Ch. D. 411. U

(5) Seal—Irregularity in affixing—Effect.

(a) Where a deed is necessary, it is generally sufficient for the person contracting with the company, to see that the seal is there, and he is not concerned to inquire whether it is properly affixed. *Re Athenaeum Society, Ex parte Eagle Co.*, 4 K and J 549. *Re Berned's Banking Co, Exp. contracts Corporation*, 3 Ch. App. 105; *Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co.*, (1895) 1 Ch. 629. V

(b) A mere irregularity in affixing it, is not material. *Reuben v. Great Fingal Consolidated*, 1906 A.C. 489; See, also, *Davies v. Bolton*, (1894), 3 Ch. 678. W

3.—“Required....under seal”—(Concluded).

(6) Fraudulently affixing seal—Forgery.

But if the seal is affixed by an unauthorised person fraudulently the deed is a forgery and does not bind the company, *Renden v. Great Fingall Consolidated*, (1906) A.C. 439. X

For further notes, see notes under S. 66, *supra*.

4.—“Any contract....made by parol.”

Consent, parol.

A company may give a parol consent to an act although no resolution on the subject has been passed. *Bourke v. Alexandra Hotel Co.*, 1877 W.N. 30; *ibid*, 157 C.A. *Reuter v. Electric Telegraph Co.*, 6 E and B 341, Y

5.—“Contracts made according....herein contained.”

(1) Mortgage partly to meet previous liabilities—Validity.

Where the articles of association of a limited company authorised its directors to borrow on bond, mortgage, or other security, or otherwise, up to a certain limit, with the sanction of share-holders, it was held that the power justified a mortgage, the object of which was in part to cover previously incurred liabilities, provided the principal amount of the loan did not exceed the limit fixed in the power. 9 C. 14. Z

(2) Powers of company—Its memorandum of association.

The powers of a company depend upon its memorandum of association or other instrument of incorporation and it can do nothing which that document does not warrant expressly or impliedly. But this doctrine must be reasonably understood and applied, and a company in carrying on the trade for which it is constituted and in whatever may be fairly regarded as incidental to, or consequential upon, the trade, is free to enter into any transaction not expressly prohibited. 14 C. 189. A

(3) See, also, note under ‘contracts’ Nos. 1 to 6 under this section, *supra*. B

68. Every limited Company under this Act shall keep a register¹ of all mortgages and charges² specifically affecting property³ of the Company, and shall enter in such register, in respect of each mortgage or charge⁴, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge.

If any property of the Company is mortgaged or charged without such entry as aforesaid being made, every director, manager or other officer of the Company who knowingly and wilfully⁵ authorises or permits the omission of such entry shall incur a penalty not exceeding five hundred rupees.

The register of mortgages required by this section shall be open to inspection⁶ by any creditor or member of the Company⁷ at

all reasonable times. If such inspection is refused, any officer of the Company refusing the same, and every director and manager of the Company authorising or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding fifty rupees, and a further penalty not exceeding twenty rupees for every day during which such refusal continues.

The High Court or any Judge thereof may by order compel the performance of the duty imposed by this section on a limited Company, and in addition to the above penalty may, by order, compel an immediate inspection of the register.

Explanation 8.—Omission to register ⁹ under this section a mortgage or charge does not render the same invalid. But the officers ¹⁰ of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered.

(Notes).

General.

Corresponding English Law.

The first two paragraphs of this section correspond to S. 100 of the Companies (Consolidation) Act, 1908. The third and fourth paragraphs correspond to S. 101 of the said Act.

The explanation to this section is an addition in the Indian Act and the latter portion of the explanation which invalidates a mortgage or charge affecting the Company's property in favour of any of its officers of a departure from the English Law. G

1.—“A register.”

Separate book not necessary.

The Act does not require the registration of mortgages to be made in a separate volume; entering the particulars required by this section on a blank page in the Company's register of transfers has been held sufficient. *Underbank Mills, etc., Co.*, 31 Ch D. 226, Russell and Bayley, 3rd Ed., p. 96. D

2.—“Mortgages or charges.”

- (1) As to what are mortgages or charges, what powers the company possesses to mortgage or create a charge on, its property, &c., *vide* Art. 55, Table A, Schedule I of this Act, *infra* and notes thereunder. E

(2) Company—Mortgage partly to meet previous liability—Validity.

Where the articles of association of a limited Company authorised its directors to borrow on bond, mortgage or other security or otherwise, to a certain limit, with the sanction of share-holders, it was held that the power justified a mortgage the object of which was in part to cover previously incurred liabilities, provided the principal amount of the loan did not exceed the limit fixed in the power. 9 C. 14. F

2.—“*Mortgages or charges*”—(Concluded).

(3) Company—Power to borrow—Debt to meet current liabilities—Distinction.

There is a distinction between loans, which a Company is empowered to raise under its borrowing powers and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the Company or its agents on its behalf, have contracted. 9 C. 14. G

3.—“*Affecting property.*”

Books of the Company.

The—are not included in the general words of “affecting the property of the Company” and a mortgagee in possession cannot retain them against the liquidator of the Company. *Clyne Tin Plate Co.*, 47 L.T. 439; *Engel v. South Metropolitan Brewing Co.*, (1892) 1 Ch. 442. H

4.—“*In respect of each charge or mortgage.*”

Registration—What ought to be registered.

The property charged, not the instrument, is required to be registered. *Per* Jessel M.R. in *Smith's* case, 11 Ch.D. 579 (C.A.) cited in Halsbury, Vol. V., p. 364. I

5.—“*Knowingly and wilfully.*”

Meaning.

The words “knowingly and wilfully” suppose a *Mens rea*—culpable negligence. *Per* Bramwell, L.J. in *Smith's* case, 11 Ch. D. 598. See, also, *Borough of Hackney Newspaper Co.*, 11 Ch. D. 598. J

6.—“*Shall be open to inspection.*”

(1) Inspection, right of—what it includes. The right to inspect includes a right to take copies.

See *Nelson v. Anglo-American Land Mortgage agency Co.*, (1897), Ch. 130 (134); *Re Credit Co.*, (1879), 11 Ch.D. 256; *Bevan v. Webb*, (1901), 2 Ch. 59, 75 C.A.; *Norey v. Keep*, (1909), 1 Ch. 561; *Re Balagat Gold Mining Co.*, (1901), 2 K.B. 665 C.A. cited in Halsbury, Vol. V, p. 365. J-1

(2) Right to inspect, when ceases—Winding up.

The power to order inspection ceases when the Company goes into liquidation, and in that case the only inspection which a creditor or contributory has is in conformity with an order of the winding-up Court under S. 221 of the Companies (Consolidation) Act, (1908); *Scmerset v. Land Securities Co.*, (1897), W.N. 29. K

(3) Right to inspect at common law—Special interest and definite object necessary.

The right to inspect the documents of a Corporation which at Common Law belongs to every member of such corporation is not an absolute right, but is confined to cases where the member of the corporation has in view some definite right or object of his own and to those documents which would tend to illustrate such right or object. 12 C.W.N. 825 (P.C.) = 8 C.L.J. 103 = 5 A.L.J. 463 = 4 M.L.T. 16. L

6.—“*Shall be open to inspection*”—(Concluded).

- (4) *Ibid.*—Object of communicating to other share-holders for bringing about scheme for improvement—No right.

Where it appeared that the object of the plaintiff was to obtain an inspection order to communicate to the share-holders, with the view of obtaining their help, in bringing about an improvement in the administration of the Corporation's affairs, no relief could be granted to the plaintiff.
12 C.W.N. 825 (P.C.) = 8 C.L.J. 103 = 5 A.L.J. 463 = 4 M.L.T. 16. M

7.—“*By any creditor or member of the Company.*”

- (1) Right of solicitor or other person to inspect.

A solicitor, an accountant or other competent person may be appointed to inspect on behalf of share-holder. *Re Credit Co.*, 11 Ch. D. 256. *Bevan v. Webb*, (1901), 2 Ch. 59, 75; Halsbury, Vol. V, p. 365. N

- (2) Inspection actuated by malice—Effect.

The fact that the person seeking inspection is actuated by motives hostile to Company is no defence to his legal right to inspect. *Mutter v. Eastern and Midlands Railway*, 38 Ch. D. 92; *Bloxam v. Metropolitan Railway*, 3 Ch. 337. See, also, *Forrest v. Manchester Railway*, 38 Ch. D. 92, 104. O

8.—“*Explanation.*”

- (1) English Law—Security in favour of officer.

“Had the legislature thought right, it might have rendered all mortgages or charges invalid unless they have been entered in this account; it has not done so. It might further have enacted that no director or officer of the Company should take any benefit from any charge or mortgage whereof he was the owner if he were a party to its non-registration; this it has not done. It has simply enacted a pecuniary penalty for the non-performance of the Statutory duty where that Statutory duty is knowingly and wilfully omitted.” *Per* Lord Halsbury, L.C. in *Wright v. Horton*, 12 App. Cas. 371 (377). See, also, Halsbury, Vol. V, p. 735, footnote (h). P

- (2) Indian Law—Security in favour of officer.

In India, as the explanation shows, the legislature has thought it right to invalidate altogether the unregistered mortgages of the officers of the Company. Russell and Bayley, 3rd Ed., p. 96. Q

9.—“*Omission to register.*”

- (1) Effect.

The omission to register does not invalidate the security. *Wright v. Horton*, 12 App. Cas. 371. R

- (2) Share-holder's security—Omission to register—Effect.

A security or charge on Company's property in favour of a share-holder is not invalid merely because of omission to register the same. *Re General South American Co.*, (1876), 2 Ch. D. 337 C.A. S

10.--"Officers."

(1) Company's bankers.

The—are not officers of the Company. *Re General-Provident Assurance Co.*;
Exp. *National Bank*, (1872), L.R. 14 Eq. 507. T

(2) Solicitor.

The—of the Company, acting in the transaction is an officer of the Company.
Re Patent Bread Machinery Co.; Exp. *Valpy and Chaplin*, (1872), 7
Ch. App. 289; *Re Hackney (Borough) Newspaper Co.*, (1876), 3 Ch.
D. 669. Compare *Re Great Wheal Polgoth Co.*, (1883), L.J. (Ch)
42 : *Re International Pulp and Paper Co.*, Knowl's Mortgage, (1877),
6 Ch. D. 556, 560; *Carter's case* 31 Ch. D. 496; *Re Liberator Perma-
nent Benefit Building Society*, (1894), 71 L.T. 406 ; *Re Dublin Dra-
perry Co.*, Exp. *Cox*, (1883), 13 L.R. Ir. 174. U

69. Every limited banking Company, and every insurance

Certain Companies
to publish statement
entered in schedule.

Company, and deposit, provident or benefit Socie-
ty under this Act, shall before it commences
business, and also on the first Monday in February
and the first Monday in August in every year during which it carries
on business, make a statement in the form marked D in the first
schedule hereto, or as near thereto as circumstances will admit ; and
a copy of such statement shall be put up in a conspicuous place in the
registered office of the Company and in every branch office or place
where the business of the Company is carried on.

If default is made in compliance with the provisions of this
section, the Company shall be liable to a penalty not exceeding fifty
rupees for every day during which such default continues ; and every
director and manager of the Company who knowingly and wilfully
authorises or permits such default shall incur the like penalty.

Every member and every creditor of any Company mentioned
in this section shall be entitled to a copy of the above-mentioned
statement on payment of a sum not exceeding eight annas.

(Note).

General.

Corresponding English Law.

This section corresponds to S. 108, paras 1 to 4 of the Companies (Consolida-
tion) Act, (1908). Y

70. Every Company under this Act and not having a capital

List of directors to
be sent to Registrar.

divided into shares shall keep at its registered
office a register containing the names and ad-
dresses and the occupations of its directors or
managers, and shall send to the Registrar of Joint-Stock Companies

a copy of such register, and shall from time to time notify to the Registrar any change that takes place in such directors or managers.

(Note).

General.

Corresponding English Law.

This section corresponds to S. 75, cl. 1., Companies (Consolidation) Act, (1908). **W**

71. If any Company under this Act and not having a capital divided into shares makes default in keeping a register of its directors ¹ or managers, or in sending a copy of such register to the Registrar in compliance with the foregoing rules, or in notifying to the Registrar any change that takes place in such directors or managers, such delinquent Company shall incur a penalty not exceeding one hundred rupees for every day during which such default continues ; and every director or manager of the Company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

Penalty on Company not keeping register of directors.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 75, cl. (2), Companies (Consolidation) Act (1908). **X**

1.—“Director.”

Director—Qualification shares—Time for taking shares.

Shares taken as a qualification for directorship of a Company need not be taken from the Company. It is enough if they are taken from open market or from a friend within a reasonable time after acceptance of office. They need not be shares for which the qualifying director has paid.

13 B. 1.

Y

72. A promissory note, bill of exchange, or hundi shall be deemed to have been made, drawn, accepted or endorsed on behalf of any Company ¹ under this Act, if made, drawn, accepted or endorsed in the name of the Company by any person acting under the authority of the Company ², or if made, drawn, accepted or endorsed by or on behalf or on account of the Company ³ by any person acting under the authority of the Company.

Promissory notes, bills of exchange and hundis.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 77, Companies (Consolidation) Act, (1908). **Z**

I.—“On behalf of any Company.”

(1) Making bills on behalf of Company.

As to what is a sufficient making on behalf of the Company by persons acting under the authority of the Company. See *Ex-parte Agra Bank, Re, Barker & Co.*, 9 Eq. 725 (734). A

(2) Agent—Contract on Company's behalf—Personal liability.

(a) The agent of a Company is not personally liable when he contracts on behalf of the Company. P.R. No. 3 of 1867. B

(b) An agent may become personally liable on a contract made by him on behalf of a Company if it is made in his own name and it does not appear from the document that he did not intend to contract as principal as under an agreement headed as one between the Company and a stranger by which “we the three undersigned directors of the Company” agreed to repay the stranger's advance. *McCollin v. Gilpin*, 5 Q.B.D. 390; 6 Q.B.D. 516. C

2.—“Acting under the authority of the Company.”

(1) Power to deal in bills, &c., not given by Act but by Company's articles and memorandum.

The Companies (Consolidation) Act, (1908), does not give to all companies incorporated under it as an incident of their incorporation, the power of accepting bills or issuing negotiable instruments; but leaves such power on the part of the Company so incorporated to be determined on the construction of its memorandum and articles. *Re Peruvian Railways Co., Peruvian Ry Co., v. Thames, etc., Marine Ins. Co.*, 2 Ch. Ap. 617 (623). It is submitted this statement of law applies in principle to the Indian Act as well. D

(2) Articles and memorandum silent—Power when implied.

If they are silent on the subject, the power may be inferred where the nature of the Company's business involves such power. *Re General Estates Co., Exp. City Bank*, 3 Ch. Ap. 758; and other cases cited in Halsbury, Vol. V, p. 304. E

(3) Mode of giving authority to accept.

“I can have no hesitation in saying that it was not necessary for the directors to pass any resolution in order to make the acceptance of bills binding on the Company, or in saying that if the directors met together and the Chairman with their knowledge accepted a bill of exchange, that would bind the Company. In the same way, if a bill of exchange had been accepted by the Chairman without due authority, and the directors afterwards at a meeting, knowing that the acceptance had been given and dealt with, acted on the footing that the bill had been properly accepted, I should have not the least hesitation in saying that the acceptance would bind the Company.” *Per Gifford, L.J.*, in *Re Barker & Co.*, 9 Eq. 725. F

(4) Power of Companies to make bills or notes.

A corporation has no power to make, indorse or accept bills or notes; (a) without a special authority, express or implied. *Bales on Bills*, 16th Ed., p. 81. See, also, *Bateman v. Midland Ry. Co.*, L.R. 1 C.P. 499 or (b) except when the negotiation of bills, etc., is itself one of the purposes for which the Company exists and perhaps when their business wholly or chiefly consists in buying and selling. *Ibid. Exp. City Bank*, 3 Ch. 758. G

2.—Acting under the authority of the Company’—(Continued).

- (5) **Company—Acceptance and endorsement of bills, one of its objects—Bill duly accepted—Company liable.**

In a Company, one of whose objects was to accept and endorse bills, it was held that bills accepted *modo et forma* by the authority of the Board were binding on the Company, although a provision as to the deposit of securities to a certain amount had not been complied with. *Land Credit Co., of Ireland*; *Exp. Overend, Gurney Co.*, 4 Ch. 460. H

- (6) **Power to issue bills, need not be express.**

A power to issue bills need not, however, be given in express terms; a corporation may issue bills where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issuing bills, or where the business of the corporation is one which cannot, in its ordinary course, be carried on without bills. It is a question of construction of the memorandum and articles. See *Buckely*, 9th Ed. p. 173; and cases cited therein under footnote (j). I

- (7) **Authority to borrow money—No mention of bills of exchange—Power to borrow on bills.**

Where the articles of association of a certain company authorized its directors to borrow, from time to time, in the name of the Company, such sums of money ‘by bonds, debentures, or promissory notes, or in such other manner as they deem best,’ it was held that, although the power to borrow money was not specifically given, yet, they, being in many respects analogous to promissory notes, must be deemed to be included in the general words ‘or in such other means as they deem best.’ 3 B. 149. J

- (8) **Companies not authorised to deal with bills—Instances.**

The business of the following companies has been held not to involve the power of issuing or accepting bills, viz.:—

- i. A Railway Company, *Bateman v. Mid Wales Railway Co.*, L.R. 1 C.P. 499.
- ii. A Water-works Company, *Broughton x. Manchester Water-works Co.*, 3 B. & Ald. 1.
- iii. A Mining Company, *Dickinson v. Valpy*, 10 B. & C. 128 (187), *Hawatayne v. Bourne*, 7 M. & W. 595.
- iv. A Cemetery Company, *Bramah v. Roberts*, 3 Bing. N.C. 963.
- v. A Salt Company, *Bult v. Morrell*, 12 Ad. & E. 745.
- v. A Salvage Company, *Thompson v. Universal Salvage Co.*, 1 Exch. 694. K

- (9) **Acceptance on Company’s behalf need not be express.**

This section does not require that the making, accepting or indorsing shall be ‘expressed to be’ on behalf of the Company. *Okell v. Charles*, 34 L.T. 822. L

- (10) **Company not authorised to accept bills—Acceptance by Directors—Liability.**

If the Directors of a Company which has no power to accept bills do accept a bill in such a way as to purport to bind the Company, they are liable to a *bona fide* holder for misrepresentation of fact in representing that they had authority to accept on behalf of the Company. *West London Commercial Bank v. Kitson*, 12 Q.B.D. 157 = 13 Q.B.D. 160. M

- (11) **Company not empowered to accept bills or re-drafts—Acceptance of re-drafts—Company not liable.**

Where the Company had no power to issue bills of exchange or accept re-drafts, the holders of those drafts which had been, in fact, accepted were in no better position than the holders of unaccepted ones. 7 B.L.R. 583. N

2.—“Acting under the authority of the Company”—(Continued).

- (12) Bill given without authority to meet urgent demand—Company, though otherwise liable, not bound by all.

Where there is no express power, the Company, even if it would in other cases be liable, is not liable, if the bill is given to meet an unusual occurrence or emergency not in ordinary course of business. *Re Cunningham & Co. Ltd., Simpson's claim*; 36 Ch. D. 532; *Hawatayn v. Bourne*, 7 M. & W. 595; *Re Moseley Green Coal and Coke Co. Exp. Official Liquidator*, 10 L.T. 819. O—S

- (13) Director not authorized except with secretary's signature—Acceptance by Director alone—Company not bound.

A Director who consistently with the articles might have been, but who was not in fact authorized, except with the counter-signature of the secretary of the Company, is not, upon the principle of *Royal British Bank v. Turquand*, 6 E. & B. 327, to be taken to be 'acting under its authority' when he signed a bill without counter-signature. *Premier Bank v. Carlton Co.*, (1909) 1 K.B. 106. T

- (14) Acceptance by director—Power to accept not delegated to him—Effect.

Where a director without authority accepts bills on behalf of a Company whose articles give power to delegate the duty of accepting bills to a director and such delegation has not taken place, the Company is not liable. *Premier Industrial Bank, Ltd. v. Carlton Manufacturing Co., Ltd. and Crabtree*, (1909) K.B. 106; *distinguishing Gloucester Country Bank v. Rudry Mertyyr Steam and House Coal Colliery Co.*, (1895) 1 Ch. 629 and *Beggerstaff v. Rowatt's wharf Ltd.*, (1896) 2 Ch. 93. U

- (15) Signature by Directors—Sufficiency of seal to exclude personal liability.

Where the directors signed their names to a promissory note "We the directors of the A Company promise to pay," and the seal was affixed "witness by L.L.," the directors were personally liable, there was nothing to exclude their personal liability, and the seal was not sufficient to show that the signature was on behalf of the Company. *Dultom v. Marsh*, L.R. 6 Q.B. 361, *Chapman v. Swethurst*, (1909) 1 K.B. 73; *Courtauld v. Saunders*, 15 W.R. 906=16 L.T. 562 and other cases cited at p. 172, Buckley, 9th Ed. Y

- (16) Holder in due course, not concerned with strict scope of agent's authority.

A holder in due course is not concerned to see that the authority of the agent has been strictly followed. *Re Land Credit Co., of Ireland, Exp. Overand, Gurney & Co.*, 4 Ch. Ap. 460 (473); *Hambro v. Burmand*, (1904) 2 K.B. 10 C.A.; *Thompson v. Wesleyan Newspaper Association*, 8 C.B. 849; *Re State Fire Insurance Co., Exp. Meredith's and Conner's Claims*, 32 L.J. Ch. 300. W

- (17) Holder having notice of agent's limited authority—Duty to enquire.

(a) Where a holder has notice that the agent has only a limited authority, he is bound to enquire into the extent of his authority. *Bryant, Pows and Bryant v. La Banque du Peuple*, 1893 A.C. 170 (P.C.); *Gomperts v. Cook*, (1903) 20 T.L.R. 106 and other cases cited in footnote (c), Halsbury, Vol. V. p. 305. X

(b) He cannot say he made no enquiry. *Jacob v. Morris*, (1902) 1 Ch. 816 C.A. Y

2.—“Acting under the authority of the Company” —(Concluded).

- (18) **Company liable—Agents using words sufficient to render them personally liable—Effect.**

If the Company is liable in the bill, its authorized agents are not personally liable, although using words apparently sufficient for the purpose, such as ‘I promise,’ ‘we promise.’ *Chapman v. Smethurst*, (1909) 1 K.B. 927 C.A.; *Lindus v. Melrose*, 3 H. & N. 177; *Halford v. Cameron’s Coolbrook and Rail Co.*, 16 Q.B. 442; *Forbes v. Marshall*, 11 Exch. 166; *Aggs v. Nicholson*, 1 H. and N. 165. **Z**

- (19) **Signature on bills to be on behalf of principal.**

The signatures ought to be expressed to be on behalf of a principal or in a representative capacity. *Alexander v. Sizer*, 4 Exch. 102; *Dutton v. March*, 6 Q.B. 361; *Landes v. Marcus*, (1909) 25 L.R. 478. See Halsbury, Vol. V, p. 306. **A**

- (20) **Signing as officers of Company—Sufficiency to exclude personal liability.**

Words describing the signatories as officers of the Company do not by themselves exclude their liability. *Courtauld v. Saunders*, 16 L.T. 562 C.A.; *Dutton v. Marsh*, 6 Q.B. 361; *Penkivil v. Connell*, 5 Exch. 381; *Atkins & Co. v. Wardle*, 58 L.J.Q.B. 377. **B**

- (21) **Bill drawn on Company ‘limited’—Acceptance without word ‘limited’—Liability.**

Where a bill is drawn on a Company ‘limited’, and accepted without the word, the Company is liable. *Dermatine Co. v. Ashworth*, (1905) 21 T.L.R. 510; See Halsbury, Vol. V, p. 306. **C**

- (22) **Bill drawn on Company—Acceptance by directors as such—Liability.**

If a bill is directed to a Company, and accepted by its directors describing themselves as directors of the Company, signed “A. B. C. directors,” the Company alone is liable. *Okell v. Charles*, 34 L.T. 822 C.A. **D**

- (23) **Acceptance on behalf of Company having no power to accept—Company not bound.**

(a) Where a Company has no power to accept, an acceptance by the directors and secretary ‘for and on behalf of the Company’ makes them personally liable on a warranty of authority. *West London Commercial Bank v. Kitson*, 13 Q.B.D. 360. **E**

(b) Such acceptance does not give rise to an implied warranty that the Company has funds at its bank to meet a cheque or an acceptance. *Beathe v. Ebury*, L.R. 7 H.L. 102. **F**

- (24) **Loan to director—Acceptance for Company—Liability, question of fact.**

If a loan is made to a director who has become liable on a bill accepted for the Company’s purposes, it is a question of evidence, whether the loan is made to him personally or to the credit of the Company. *Colley v. Smith*, 2 Mood. and R. 96; *Compare McCollin v. Gilpin*, 6 Q.B.D. 516. **G**

- (25) **Authority to accept, not implied by authority to draw.**

An authority empowering the agents to “draw, endorse and negotiate on behalf of the Company all such cheques as should be necessary for enabling them to carry on the Company’s business” does not empower them to accept bills drawn on the Company. 13 C. 412, 9 C. 880. **H**

3.—“On behalf of or on account of the Company.”

(1) Bill or note on account of Company, not necessarily on its behalf as regards strangers.

(a) A bill or note may be in a certain sense on behalf of or on account of a company, though there is upon its face no reference to the Company, even in the form of a description of the persons who actually make, accept, or endorse it as being directors or secretary. 3 B. 439; 4 B. 275. O

(b) As between such persons and the company, such a bill or note may well be on behalf of or on account of the Company, but it is therefore not so as between the Company and third parties. (*Ibid.*) P

(2) Bills or notes—When Company bound as against third parties.

(a) So far as third parties are concerned, a Company under this Act, can be made liable on a bill or note only when such bill or note on the face of it expresses that it was made, accepted, or endorsed by, or on behalf of or on account of, the Company, or where that fact appears by necessary inference from what the face of the instrument itself shows. 3 B. 439; 4 B. 275. Q

(b) The addition to the signature of individuals as makers, drawers, acceptors or endorsers of notes or bills, of their description as director or secretary, treasurer and agent of a certain Company, is not considered to raise such inference, as it does not exclude the supposition that though described as directors, etc., they intended to make themselves personally liable to holders of the instrument, though, as between themselves and the Company, they may be entitled to be indemnified for anything they may have paid on account of the Company in respect of such notes or bills. 3 B. 439 (*following Dutton v. Marsh*, L. R. 6 Q. B. 361). R

73. If any Company under this Act carries on business when

Prohibition
against carrying on
business with less
than seven members.

the number of its members is less than seven, for a period of six months after the number has been so reduced, every person who is a member of such Company during the time that it so carries on business after such period of six months, and is cognizant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debt of the Company contracted during such time, and may be sued for the same without the joinder in the suit of any other member.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 115, Companies (Consolidation) Act, 1908.

S. 115, of the English Act, contains a similar prohibition as regards “private” Company carrying on business with less than two members. S

Payment of interest out of capital.

73-A. Where any shares of a Company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant ¹ which cannot be made profitable for a lengthened period, the Company may pay interest on so much of that share capital as if for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the costs of construction of the work or building, or the provision of plant :

Power of Company to pay interest out of capital in certain cases.

Provided that :—

(1) no such payment shall be made unless the same is authorised by the Company's articles of association or by special resolution;

(2) no such payment, whether authorised by the articles of association or by special resolution shall be made without the previous sanction of the Governor General in Council ;

(3) before sanctioning any such payment, the Governor General in Council may, at the expense of the Company, appoint a person to inquire and report to him as to the circumstances of the case, and may, before making the appointment, require the Company to give security for the payment of the costs of the inquiry ;

(4) the payment shall be made only for such period as may be determined by the Governor General in Council, and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided ;

(5) the rate of interest shall in no case exceed 4 per cent. ² per annum or such lower rate as the Governor General in Council may, by notification in the *Gazette of India*, prescribe ;

(6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid ;

(7) the accounts of the Company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate ;

(8) nothing in this section shall affect any Company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies.

(Notes).

General.

(1) Section when enacted.

This section was inserted by Act IV of 1910.

T

(2) Corresponding English Law.

This section corresponds to S. 91, Companies (Consolidation) Act, 1908.

U

(3) Analogous provision.

The Indian Railway Companies Act, (X of 1895), enables the Indian Railway Companies to pay interest out of capital during construction, on the sanction of the Secretary of State in Council of India being previously obtained and subject to the conditions of the Act. (See S. 3, Act X of 1895).

Y

1.—“Raising money....provision of any plant,”

(1) Power to pay dividends out of capital.

Apart from this section, dividends may not be paid out of capital, and any such payment is an *ultra vires* act on the part of the directors of a Company and constitutes a breach of trust, rendering them liable to make good to the Company any amount so paid. *Oxford Benefit Building Society*, 35 Ch. D. 502; *Flitcroft's case*, 21 Ch. D. 519; *Masonic Assurance Co.*, (1892) 1 Ch. 154.

W

(2) What the section permits.

The section only permits interest to be paid on shares which are issued to provide money for the construction of works or buildings, or the provision of plant. *Evans and Cooper*, p. 130.

X

(3) What the Company ought to do.

(a) So far as the Company is concerned, all that it can do is to take care (1) that the shares are issued solely for the purpose of defraying expenses of the kind specified; (2) that the articles, if necessary, are altered, or a special resolution passed, to authorise the payment; (3) to apply to the Governor-General in Council for sanction. See *Evans and Cooper*, p. 131.

Y

(b) If the Governor-General in Council grants sanction, it, (1) may charge such payments to capital as part of the cost of construction, and (2) must show in its accounts, from time to time, the capital on which and the rate at which, interest has been paid during the period covered by the accounts. (*Ibid.*)

Z

2.—“Rate of interest....4 per cent.”

Interest.

No higher rate than 4 per cent. can, in any circumstances, be paid, and a lower rate may be fixed. *Evans and Cooper*, p. 131.

A

Re-issue of Redeemed Debentures.

- 73-B.** (1) Where either before or after the passing of this Act a Company has redeemed any debentures previously issued, the Company, unless the articles of association or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the Company

Power to re-issue redeemed debentures in certain cases.

so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a Company has purported to exercise such a power the Company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have either before or after the passing of this Act been transferred to a nominee of the Company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a Company has either before or after the passing of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the Company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a Company, whether the re-issue or issue was made before or after the passing of this Act, shall be treated as the issue of a new debenture for the purposes of stamp-duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued :

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp-duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the Company shall be liable to pay the proper stamp-duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order² of a Court of competent jurisdiction passed or made before the date of the passing of this Act as between the parties to the proceedings in which the decree was passed or the order made, and any appeal from any such decree, or order shall be decided as if this Act had not been passed ; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a Company by its debentures or the securities for the same."

(Notes).

General.

(1) Enactment of section.

This section was inserted by Act IV of 1910.

B

(2) Corresponding English Law.

This section corresponds to S. 104, Companies (Consolidation) Act, 1908.

B1

(3) Reason for enacting similar section in England.

This section was enacted by the Legislature to counteract the mischief done by a series of decisions the result of which has been to deprive the holders of debentures, which have been re-issued, either after they have been issued to or deposited with a lender as security for a loan which has been since paid off, of their security ; since even if the Company's power has not been exhausted, yet, in any case the re-issued debentures will rank after other securities created before their re-issue. *Re George Routledge*, (1904) 2 Ch. 474 ; *Re Tasker*, (1905) 2 Ch. 587 ; *Re Perth Electric Tramways*, (1906) 2 Ch. 216 ; *London Russian Investment Trust v. Russian Petroleum Co.*, (1907) 2 Ch. 540, cited in Evans and Cooper, pp. 147, 148.

C

1.—" Debentures."

(1) Debenture, what it is.

A debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture. *Per Chitty, J. in Levy v. Abercorris Slate Co.*, (1888) 37 Ch. D. 264.

D

(2) Definition.

"I cannot find any precise legal definition of the term ; it is not either in law or procedure a strictly technical term, or what is called a term of art." (*Ibid.*)

E

2.—" Order."

Winding up order.

A—is not such an order as is contemplated by sub-section 5 (a). *Appleyard v. New London and Suburban Omnibus Co.*, (1908) 1 Ch. 621.

F

Provisions for Protection of Members.

74. A general meeting of every Company under this Act shall be held once at the least in every year.

General meeting
of Company.

A balance-sheet ¹ shall be made out and filed with the Registrar of Joint-Stock Companies within twelve months after the Company has been registered, and once at least in every year ² afterwards within twelve months from the filing of the balance-sheet immediately preceding; and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to table A in the first schedule hereto, or as near thereto as circumstances admit.

And once at the least in every year the accounts ³ of the Company shall be examined and the correctness of the last balance-sheet and its conformity with the law ascertained and certified by one or more auditor or auditors.

No balance-sheet shall be filed with the Registrar unless and until its correctness and conformity with the law have been so ascertained and certified, and it has been laid before and adopted by the Company in general meeting.

If default is made in compliance with any of the provisions of this section, every director and manager of the Company who knowingly and wilfully authorises or permits such default shall be liable to a penalty of one thousand rupees.

(Notes).

General.

Corresponding English Law.

The first para of S. 74 corresponds to cl. 1 of S. 64, Companies (Consolidation) Act, 1908.

1.—“Balance-sheet.”

Failure to file balance-sheet—Registrar alone competent to prosecute.

A complaint under S. 74, for wilful default in filing a balance sheet, not brought by the Registrar but by a clerk of his office and countersigned by the Public Prosecutor, is bad in law and not entertainable by a Criminal Court. 35 P.W.R. 1910 (Cr.).

G

2.—“Year.”

Meaning.

The word ‘year’ means the period of time commencing on the 1st January and ending on 31st December, and not the period of twelve months commencing from the day of registration of a Company. *Gibson v. Barton*, L.R. 10 Q.B. 329; *Edmonds v. Foster*, 33 L.T. 690.

H

3.—“Accounts.”

Managing Agent—Liability to account.

The relationship between a Company and its managing agent being that of principal and agent, it is the duty of the latter to render proper accounts to the Company. The fact that an agent of a Company was paid by commission or was subordinate to the control of its directors, or that he had delivered up to them all the account books of the Company, does not exonerate him from liability to account. 69 P.R. 1903 (referring to 14 C. 147 (P.C.); 7 C. 627). I

Meetings.

75. Every Company formed under this Act, after the commencement of this Act, shall hold a general meeting¹, within six months after its memorandum of association is registered; and, if such meeting is not held, the Company shall be liable to a penalty not exceeding fifty rupees a day for every day after the expiration of such six months, until the meeting is held; and every director or manager of the Company and every subscriber of the memorandum of association who knowingly authorises or permits such default shall be liable to the same penalty.

(Notes).

General.

1.—“Meeting.”

Meeting.

The first—may be an ordinary or extraordinary meeting. *Lord Claud Hamilton's case*, 8 Ch. 548. J

76. Subject to the provisions of this Act and to the conditions contained in the memorandum of association¹, any Company formed under this Act or the Indian Companies Act, 1866, may, in general meeting, from time to time, by passing a special resolution² in manner hereinafter mentioned, alter all or any of the regulations³ of the Company contained in the articles of association, or in the table marked A in the first schedule, where such table is applicable to the Company, or make new regulations to the exclusion of, or in addition to, all or any of the regulations of the Company.

Any regulations so made by special resolution shall be deemed to be regulations of the Company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

X of 1866.

of 1866.

Power to make
liability of directors
unlimited.

Any limited Company formed under this Act or the Indian Companies Act, 1866, may by a special resolution, if authorised to do so by its regulations as originally framed or as altered by special resolution, from time to time modify the conditions contained in its memorandum of association so far as to render unlimited, from and after the date of such resolution, the liability of its directors or managers, or of the managing director. Such special resolution shall be of the same validity as if it had been originally contained in the memorandum of association, and a copy thereof shall be embodied in, or annexed to, every copy of the memorandum of association which is issued after the passing of the resolution.

(Notes).

General.

Corresponding English Law.

The first two paragraphs of S. 76 correspond to S. 13, cl. 1 of the English Companies (Consolidation) Act, 1908. K

The third paragraph of S. 76 corresponds to S. 61, cls : (1) and (2) of the English Act of 1908. L

1.—“Subject to the provisions....memorandum of association.”

(1) Memorandum of association—Trading under—Terms of memorandum—Construction.

The doctrine that a Company can do nothing which is not expressly or impliedly warranted by its memorandum of association or other instrument of incorporation, must be reasonably understood and applied. 14 C. 189. M

(2) Business not prohibited by memorandum, etc.—Company's power to transact.

A Company in carrying on the trade for which it is constituted, and in whatever may be fairly regarded as incidental to, or consequential upon, that trade, is free to enter into any transaction not expressly prohibited. 14 C. 189. N

2.—“Special....resolution.”

(1) Special resolution inconsistent with an article, when effective.

The passing of a special resolution inconsistent with an existing article is not effective unless a special resolution has been passed at previous meetings altering that article. *Imperial Hydropathic Hotel Co., Blackpool v. Hampson*, 23 Ch. D. 1 (C.A.); *Re Patent Invert Sugar Co.*, 31 Ch. D. 166 (C.A.). O

(2) Exercise of non-existing powers—Resolution purporting such exercise—Not valid.

Where the Act requires the articles to give the necessary power for certain purposes the resolution purporting to exercise that power is of no avail unless the power is already in the articles or has been added by special resolution. *James v. Buena, &c., Syndicate, Ltd.*, (1896) 1 Ch. 456 (463), C.A.; *Boschels Proprietary Co., Ltd. v. Fulke*, (1906) 1 Ch. 148 and other cases cited in Halsbury, Vol. V, p. 208, foot-note (a). P

2.—“*Special . . . resolution*”—(Concluded).

- (3) Resolution altering original contract—Diversion of Company's revenue to other objects—Invalidity.

No resolution of the Company, special or otherwise, could alter the contract made by the memorandum of Association between the Company and all the share-holders and the revenue of the Company must be applied in the manner originally prescribed by the memorandum of Association. *Per Kay, J. in Ashbury v. Watson*, 30 Ch. D. 56. Q

- (4) Articles of Association—Special resolution superseding—Necessity for stamp.

A document styled as articles of association drawn up by a Company, on a special resolution, in supersession of the articles it already possessed, is nothing more than a record of special resolution and does not require a new stamp. 22 A. 131=20 A.W.N. 15. R

3.—“*May alter . . . regulations.*”

- (1) Alteration of memorandum by articles—Power.

Under S. 76 of the Indian Companies Act, anything which appears in the articles of association but is not provided for in the memorandum of association may be altered by a special resolution. 33 M. 36=5 M.L.T. 290=1 Ind. Cas. 803. S

- (2) Memorandum of association—Powers given to secretary, his heirs, etc.—Alterations of powers and reduction of remuneration—Investment of powers to managing agent—Absence of agreement not to alter secretary's powers—Validity of alterations.

According to the memorandum of association, plaintiff and another, their heirs, executors and administrators were to be secretaries of a Bank, whose duties, powers, and emoluments were set out in the articles of association. Plaintiff continued to be the secretary for many years. Later on, at a general meeting, the share-holders appointed a new managing Agent to whom most of the powers of the plaintiff were transferred, modified the articles of association, and curtailed the powers and emoluments of the Secretary. Plaintiff then sued the Directors of the Bank, and prayed for an injunction restraining them from interfering with the performance of his duties as secretary, contending that the resolution of the share-holders was invalid, since it altered the memorandum of association, and also amounted to a breach of contract by the Company with regard to the terms on which he took up the secretaryship. It was held (i) that the resolution of the share-holders did not alter the memorandum of association and was therefore valid; (ii) that the portion of the articles which sets out the powers of the secretary is not a part of the memorandum and is therefore liable to be altered by a special resolution under S. 76, and, (iii) that the resolution was a valid one there being no proof of any agreement between the secretary and the Company to the effect that the subsequent alteration of the articles should not affect the terms of the contract upon which the plaintiff took up the secretaryship. 33 M. 36=5 M.L.T. 290=1 Ind. Cas. 803. T

- (3) Memorandum of association, alteration of—Introduction of new clause authorising such alteration—Not valid.

The power of altering the articles given by the section cannot be extended so as to authorise an alteration in the memorandum of association by the introduction into articles of a clause so providing. See *Ashbury Ry. Co. v. Riche*, L.R. 7 H.L. 653. U

1.—May alter....regulations''—(Continued).

(4) Power to alter, whether can be modified.

The power of alteration, which is statutory, cannot be modified by an article requiring a special resolution by a different majority; for it is imperative and not directory. *Ayre v. Skelsey's Adamant Cement Co.*, (1904) 20 T.L.R. 587. Y

(5) Power to contract out of statute.

(a) A Company cannot even by express terms of the articles, contract itself out of the power under this section, of altering its articles. *Walker v. London Tramways*, 12 Ch. D. 705; *Mallison v. National Insurance, etc., Corporation*, (1894) 1 Ch. 200; *Andrews v. Gas Meter*, (1897) 1 Ch. 361, C.A. W

(b) The share-holders cannot deprive themselves of any of the rights thereby expressly conferred upon them as share-holders. *Peveril Gold Mines, Ltd.*, 14 Times Rep. 25. X

(6) Article contrary to statute, invalid.

Any article or regulation of a Company which is contrary to any of the provisions of the statute is inoperative. *Trevor v. Whitworth*, 12 App. Cas. 409; *Ooregum Gold Mining Co. v. Roper*, (1892) A.C. 125; *Wellton v. Saffery*, (1897) A.C. 299. Y

(7) Alteration of articles—Good faith.

The articles must be altered in good faith, and not so as to give an unfair advantage to a majority of the share-holders. *Merier v. Hooper's Telegraph Works*, 9 Ch. Ap. 350; *Re Consolidated South Rand Mines Deep Ltd.*, (1909) 1 Ch. 491. Z

(8) Alteration may prejudice share-holders.

(a) The alteration may operate to the prejudice of share-holders and may have a retrospective effect. *Allen v. Gold Reefs*, (1900) 1 Ch. 656. A

(b) Articles may be altered, if acting in good faith, so as to affect the rights of a member as between himself and the Company by retrospective operation, since the shares are held subject to the power of alteration in the articles. *Halsbury*, Vol. V, para 343, p. 208 and cases cited in foot-note (c), p. 208. B

(9) Alteration authorising issue of more preference shares to increase capital—Validity.

(a) A Company having no authority under its memorandum or articles to create any preference between different classes of shares may alter its articles so as to authorise the issue of preference shares, by way of increase of capital. *Andrews v. Gas Meter Co.*, (1897) 1 Ch. 361, (*Overruling Hutton v. Scarborough Cliff Hotel*, 2 Dr. and Sm. 514). C

(b) Where a Company was empowered by its memorandum of association to increase its capital, which was fixed at £10,000 into 1000 shares at £10 each, and contemporaneous articles provided for the increase of capital by special resolution by creating new shares with or without special privileges and priorities over the original shares, it was held that a scheme for the reconstruction of the Company (which had gone into liquidation) under which special resolutions were passed and confirmed for an increase of capital by the creation of new shares to be

3.—“May alter....regulations”—(Continued).

called preferential shares with preferential dividends was not *ultra vires* and could be sanctioned. *South Durham Brewery Co.*, 31 Ch. D. 361 (following *Harrison v. Mexican Ry. Co.*, 19 Eq. 358 and distinguishing *Hutton v. Scarborough Cliff Hotel Co.*, 4 D.J. and S. 672; 2 Dr. & Sm. 514; *Guinness v. Land Corporation of Ireland*, 22 Ch. D. 349 and *Ashbury v. Watson*, 30 Ch. D. 376. Russell and Bayley, 3rd Ed., p. 111. D

(10) Modification by scheme—Preference to ordinary share-holders—Court's power.

Where the memorandum allows a modification of rights, the Court may sanction a scheme by which the ordinary share-holders benefit at the expense of preference share-holders. *Re Welsbach Incandescent Gas Light & Co. Ltd.*, (1904), 1 Ch. 87 C.A. E

(11) Voting rights.

—may be altered. *Re Colmer (James) Ltd.*, (1897) 1 Ch. 524. F

(12) Alteration affecting directors themselves—Invalidity.

Directors cannot by resolution alter the articles even so as to affect one of them adversely, as by imposing a liability, to take shares as a qualification. *De Ruvinne's case*, 5 Ch.D. 306 C.A. G

(13) Issue of preference shares prejudicial to third parties.

Where the Company had paid for property by preference shares and attempted to issue pre-preference shares, it was held that it cannot do so. *Griffith v. Paget*, 5 Ch. D. 894. H

(14) Contract prohibiting alteration of articles—Effect on such alteration—Invalidity.

If a contract is so drawn as by its terms or implication to prohibit the Company from altering its articles to the prejudice of the other contracting party, any alteration cannot justify a breach of contract with him. *Allen v. Gold Reefs of West Africa Ltd.*, (1900) 1 Ch. 656, 676 C.A. I

(15) Contract with stranger—Alteration justifying breach, invalid.

In the case of a contract with an outsider, the Company cannot, by altering its articles, justify a breach. *Bailey v. British Equitable Assurance Co.*, (1904) 1 Ch. 374; (1906) A.C. 35. See *Punt v. Symons*, (1903) 2 Ch. 506. J

(16) Ratification.

(a) —consists in adopting something which has been done or assumed to have been done for the person ratifying with full knowledge that it has been done. *Per Lord Esher in Ashbury v. Watson*, 30 Ch. D. 376 (380) C.A. K

(b) The alteration may even be effected by acquiescence. *Ho Tung v. Man on Insurance Co., Ltd.*, (1902) A.C. 232. L

(17) Rectification of mistake—Special resolution necessary.

A mistake in the articles can only be rectified by altering the articles by special resolution pursuant to the Act; the Court will not rectify the mistake in an action. *Evans v. Chapman*, (1902), 86 L.T. 381. M

3.—“*May alter....regulations*”—(Concluded).

(18) Rectification of mistake—New contract.

Articles that have not been validly altered may still form, as intended to be altered, the basis of a contract, and so be valid as between the contracting parties. *Muirhead v. Forth, etc., Insurance Co.*, (1894) A.C. 72. N

(19) Ratification—Receipt of dividends declared by *ultra vires* resolutions—Effect on dividends to be received in future.

The receipt of dividends on the footing of certain *ultra vires* resolutions might prevent any share-holder who had received them from making a claim against the Company for any larger payment during the period of such receipts, but that could not amount to a ratification of an implied contract that the dividends on these shares should be received in future on the same footing. *Per Kay, J.* in *Ashbury v. Watson*, 30 Ch.D. 56; but the Court of Appeal, on the facts of the case, found that there was no evidence on which the Court could infer that every member had ratified the resolution in question with full knowledge of what he had done. (*Ibid.*) 30 Ch.D. 376 (C.A.). O

77. A resolution ¹ passed by a Company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths ² of such members of the Company for the time being entitled, according to the regulations of the Company, to vote ³, as may be present in person or by proxy ⁴ (in cases where by the regulations of the Company proxies are allowed) at any general meeting ⁵ of which notice ⁶ specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the Company, to vote, as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days ⁷, nor more than one month, from the date of the meeting at which such resolution was first passed.

At any meeting mentioned in this section, unless a poll is demanded ⁸ by at least five members, a declaration of the chairman ⁹ that the resolution has been carried shall be deemed conclusive evidence of the fact ¹⁰, without proof of the number or proportion of the votes recorded in favour of or against the same.

Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held whenever such notice is given and meeting held in manner prescribed by the regulations of the Company.

In computing the majority under this section when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the Company.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 69, Companies (Consolidation) Act, 1908. P

1.—“A resolution.”

(1) Resolutions, mode of expressing will of Company.

The proper method by which the share-holders can express the will of the Company on any particular question is passing a resolution in general meeting. Evans and Cooper, p. 76. Q

(2) Company's consent necessary for certain acts.

The articles usually provide that certain things can be done with the consent of the Company in general meeting. The Act also provides that certain things can only be done with the sanction of a special or extraordinary resolution. Evans and Cooper, pp. 76, 77. R

(3) Resolution, a mode of expressing consent.

If there are no provisions in the articles as to the way in which the consent is to be given, it may be that a formal resolution is not strictly necessary, and that the proved assent of every one of the share-holders (and not a majority only) to a proposal would bind the Company. Evans and Cooper, p. 77. S

(4) Provision in articles, to be strictly followed.

If the articles lay down rules for ascertaining the wishes of share-holders those rules must be observed. Evans and Cooper, p. 77. T

(5) Resolution how framed.

A resolution (whether ordinary, extraordinary, special, or by directors) should be clearly expressed and should deal definitely with the result intended to be obtained, providing as may be necessary for the means by which the result is to be attained; and for the consequences which will follow; if a resolution required by the Act is to be passed, it should follow the wording of the Act. Evans and Cooper, p. 77. U

(6) Resolution, how passed.

Unless the articles otherwise provide, a resolution (not being special or extraordinary) can be passed, if the voting is taken by show of hands, by a simple majority of those present, and, if a poll is demanded, by a simple majority of the votes given at the poll. Evans and Cooper, p. 77. Y

(7) Resolution, when invalid.

A resolution is invalid :—

- i. If it contravenes any provision of the law, or is contrary to public policy ; e.g., an attempt to reduce capital without going through the proper formalities, or to finance a gambling house ;

1.—“A resolution”—(Concluded).

- ii. If it proposes that something shall be done which is beyond the powers of the Company;
- iii. If the meeting is not validly constituted according to the articles or the Act and, if any of the provisions of the articles or the Act as to the conduct of business are not observed. *Evans and Cooper*, p. 77. W

(8) Meeting convened by irregularly constituted board—Resolution—Validity.

A resolution duly passed by a meeting convened by a board irregularly constituted is valid. *Boschock Proprietary Co. v. Fuke*, (1906) 1 Ch. 148. X

(9) Director's powers, when not affected by resolutions.

The resolutions of the Company cannot limit the powers given to the directors by the articles. *Automatic Self-Cleaning Filter v. Cunningham*. (1906) 2 Ch. 324. Y

(10) Amendments.

Any amendment relative to the motion may be moved, provided that it does not go beyond the scope of the notice convening the meeting, or of the business that may be transacted at a meeting without notice. *Evans and Cooper*, p. 77. Z

(11) Amendment, improperly withheld by chairman—Court's intervention.

If an amendment is improperly withheld by the chairman from the meeting, the Court will declare the resolution invalid. *Henderson v. Bank of Australasia*, (1890) 45 Ch. D. 330. A

(12) Meeting called for confirming or rejecting resolution—Amendment altering terms, whether can be moved.

An amendment altering the terms of a resolution cannot be moved at a second meeting which has been called simply for the purpose of confirming or rejecting the resolution. *Wall v. London and Northern Assets Corporation*, (1898) 2 Ch. 469. B

2.—“Majority of not less than three fourths.”

(1) Quorum.

The number of persons who must be present at any meeting to make it a valid meeting is usually laid down by the articles. *Halsbury*, Vol. V, p. 253. C

(2) Articles silent as to number requisite—Two members sufficient.

If the articles are silent, two share-holders can form a *quorum*, but one alone is not enough. *Sharp v. Dawes*, 2 Q.B.D. 26; *Re Sanitary Carbon Co.*, (1877) W.N. 228. D

(3) Quorum not formed—Whether can be transacted.

If the quorum is not present within the prescribed time after the time appointed for the meeting no business can be transacted, except such as is authorised by statute or by the regulations of the Company. *Halsbury*, Vol. V, p. 254. E

(4) Want of quorum—Meeting, invalid.

The want of a *quorum* invalidates a meeting. *Cambrian Peat Co.*, (1875) 31 L.T. 773=23 W.R. 405. F

See, also, notes under S. 92, *infra*.

3.—“Members....entitled....to vote.”

(1) Right to attend—Share-holder.

The right of a share holder to attend meetings of the Company depends upon the provisions of the Articles of Association. Some articles provide that certain classes of share-holders (generally preference share holders) shall have no right to attend any meetings or certain classes of meetings; and others provide that unless all calls due on the shares of a share holder are paid, such share-holder shall have no right to attend meetings. Subject however to any such special provisions, all share-holders are entitled to attend meetings of the Company. Evans and Cooper, p. 75. G

(2) Purchaser of forfeited shares—Original holder in arrears of payment of calls—Purchaser's inability to vote.

Where, under the articles, there is no vote while any sum is due in respect of the shares, a purchaser of a forfeited share cannot vote, while calls for which the former holder alone is liable are unpaid. *Randt Gold Mining Co. v. Wainwright*, (1901) 1 Ch. 184. H

(3) Casting vote.

The chairman has usually a casting vote. Evans and Cooper, p. 76. I

(4) Votes—Question as to number of votes.

After a declaration by the chairman, the question as to how many votes were given cannot be gone into. *Arrot v. United African Lands Co.*, (1901) 1 Ch. 518. J

(5) Agreement to vote.

An—in a particular way is good. *Greenwell v. Porter*, (1902) 1 Ch. 530. K

4.—“Or by proxy.”

(1) Voting by proxy—Provision by articles.

The articles usually provide for a right to vote by proxy and set out a form of proxy, and the provisions and form must strictly be followed. *Harban v. Phillips*, (1882) 23 Ch. D. 14. L

(2) Proxy, by whom to be held.

A proxy can only be held by a person who is a member of the class of which a meeting has been summoned. *Madras Irrigation Works*, 1881, W. N. 120. M

(3) Proxy—Qualification at the time when he acts—Nomination—Appointment.

Where the articles of association of a United Company laid down:—“No person shall be appointed, or have authority to act who is not a share-holder in the Company,” it was held that to construe the article as requiring the person appointed to be a share-holder when the proxy is signed is to put too narrow a construction on the words. If an unqualified person is named in the proxy, the nomination is not an appointment, in any effective sense; his nomination does not become an appointment until he is qualified. In order to act, something more is required:—he must be qualified not only when he is ‘appointed’ but also when he acts. 29 B. 126 (P.C.)=7 Bom.L.R. 29=2 A.L.J. 139=1 C.L.J. 150. N

4.—“Or by proxy”—(Concluded).

(4) Unqualified person, subsequently becoming qualified—Right to hold proxy.

Though an unqualified person is named as a proxy, yet, if the qualification exists when the proxy is lodged and when it is used, it cannot be objected to. *Bombay Burma Corporation v. Dorabji*, (1905) A.C. 215. O

(4-a) Necessity of poll before use of proxy.

Proxies cannot be used on a show of hands. There must be a poll before proxies can be made use of. *Per Kay, J. in Caloric Engine Co.*, 52 L.T. 846. P

(5) Counting of proxies—Method.

At a meeting of the share-holders of a company the articles of which allow voting by proxy, the chairman, in ascertaining the number of votes given on a show of hands must count the vote of each person who hold proxies as a single vote, and not count a vote for each of the members whose proxies he holds. *Earnest v. Loma Gold Mines*, (1897) 1 Ch. 1; *overruling Bidwell Brothers*, (1893) 1 Ch. 603 and *following Caloric, &c. Co.*, 52 L.T. 846 and *Horbury, etc. Co.*, 11 Ch. D. 109. Q

(6) Proxies, attestation of.

Where one of the articles of association of a Company required that the instrument appointing proxies should be attested, unattested proxies were rejected. *Harben v. Phillips*, 23 Ch. D. 14. R

(7) Proxy paper signed in blank, when valid.

The paper may be signed in blank even though at the time of the execution, the date of the meeting has not been fixed. *Sadgrove v. Bryden*, (1907) 1 Ch. 318. R-1

(8) Stamp for proxy.

Proxies require a one anna stamp. Indian Stamp Act, 1899, Sch. I, Art. 52. S

(9) Proxies duly stamped—Blanks left to be filled up—Validity.

Proxies signed by members which are duly stamped but in which the date of the meeting was left blank and the blanks were filled up by the secretary before proxies were lodged with the company were held valid. *Ernest v. Loma Gold Mines*, (1897) 1 Ch. D. 1. T

(10) Company's funds—User for proxy—Propriety.

The company's funds may be used by the directors in sending out proxies containing the names of the directors, or in stamping the instruments, provided the directors are acting *bona fide* in the interests of the company. *Peel v. London and N.W. Ry. Co.*, (1907) 1 Ch. 5. U

5.—“General meeting.”

(1) Meeting, when properly convened.

In order that a meeting may be duly convened, it is necessary that it be convened:—

- (i) by those who have a right to convene it;
- (ii) at a proper time;
- (iii) at a proper place; and
- (iv) by a proper notice. *Russell and Bayley*, 3rd Ed., p. 113. Y

5.—“General meeting”—(Concluded).

(2) Adjournment of meeting.

(a) The chairman may adjourn a meeting under a power given by the articles, with the consent of the members present. *Salsbury Gold Mining Co. v. Hathorn*, (1897) A.C. 268. M

(b) He is not bound to do so, even when requested by a majority of shareholders. (*Ibid.*) N

(3) Business unfinished—Power to adjourn—Members' right to proceed with meeting.

A chairman cannot, without the consent of the shareholders, dissolve or adjourn a meeting while any business for which it was convened remains unfinished. If he attempts to do so, the meeting may elect another chairman and proceed with the business. *National Dwelling Society v. Sylls*, (1894) 3 Ch. 59. O

(4) General meeting—Postponement.

A general meeting properly convened cannot, in the absence of express authority in the articles, be postponed. *Smith v. Paranga Mines*, (1906) 2 Ch. 193. P

(5) Particular date fixed for general meeting—Prevention of share-holders from exercise of rights—Court's interference.

The Court will restrain directors from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing the share-holders from exercising their voting powers. *Cannon v. Trask*, 20 Eq. 669. Q

(6) Informal meeting—Adjournment.

Apart from the Regulations an informal meeting cannot be adjourned, as an adjourned meeting is legally a continuation of the original meeting. *Seadding v. Lorant*, 3 H.L.C. 418. See also notes under the heading 'chairman,' *infra*. R

6.—“Notice.”

(1) Notice—What it ought to contain.

Although a notice under this section sufficiently complies with Art. 35 of Table A (in a company regulated by that table) if it states the 'general nature' of the business, it is nevertheless desirable, when the business is of great importance, such as the proposed substitution of new articles of association for Table A, to supplement the notice with an explanatory circular. *Young v. South African &c., Syndicate*, (1896) 2 Ch. 268. S

(2) Notice—Requisites.

The notice must be absolute, not contingent or conditional. *Alexander v. Simpsons*, 43 Ch. D. 139. For further notes, see notes under heading 'notice' in Ss. 78, 89, *infra*. T

7.—“Not less than fourteen days.”

(1) 'Fourteen days.'

—mean fourteen clear days exclusive of the respective days of meeting. *Railway Sleepers Supply Co.*, 29 Ch. D. 204. U

7.—“Not less than fourteen days ”—(Concluded).

- (2) Interval less than fourteen days—Effect as between company and its members *inter se*—Stranger.

If the interval is less than fourteen clear days, the statutory defect in the resolution only affects the position of the company and its share-holders, *inter se*, and does not concern the creditors. *Miller Dale &c., Co.*, 31 Ch. D. 211. Y

8.—“ Unless a poll is demanded.”

- (1) Object of poll.

The object of a poll in the case of a meeting of members of a registered company is to ascertain the true sense of the meeting, and is not to give absent members a further opportunity of voting, unless a contrary intention is to be gathered from the articles of the company. 15 B. 164. W

- (2) Poll, how demanded.

A poll need not be openly made; it is enough if the demand is made informally and privately. *Phoenix Electric Light Co.*, 48 L.T. 260; 31 W.R. 398. X

- (3) Voting, how done when poll is not demanded.

When a poll is not demanded, the voting must be by show of hands without counting shares. In the case of a special meeting what is to be done when a poll is demanded is to be done when a poll is not demanded. Per *Jessel, M. R. Horbury Bridge & Co.*, 11 Ch. D. 109. Y

- (4) Polling, mode of.

Each voter when polling should be required to sign his name and the number of shares held by him on the voting paper. The chairman declares the result of the poll, but before doing so, it is the usual practice for him to appoint scrutineers to examine the votes given for or against the resolution; sometimes the articles provide for such scrutineers. If there are none, the responsibility rests with the chairman to reject any invalid votes. *Evans and Cooper*, p. 79. Z

- (5) Poll—Time for taking.

(a) A poll is properly and correctly taken immediately after the termination of the meeting. 15 B. 164. A

(b) The articles usually provide that the poll shall be taken in such manner and at such time and place as the chairman directs. *Evans and Cooper*, p. 79. B

- (6) Poll, right to—When arises.

The common law right to a poll exists wherever a meeting is one where a large class of persons might have had a vote, but where some are not present, and some who are present demand a poll. Per *Brett, L.J.* in *Reg v. Wimbledon Local Board*, 30 W.R. 402. C

- (7) Poll—Its operation.

The poll operates as an adjournment of the meeting, which is not ended until the decision of the poll has been taken. Per *Cotton, J. ibid.* D

- (8) Poll—Who can demand.

In the absence of any regulations, the chairman is the proper person to demand a poll. *Reg v. Hedger*, 12 A. and E. 139. E

8.—“*Unless a poll is demanded*”—(Concluded).

(9) Poll—Absence of provision—Chairman's power.

At common Law, where the taking of a poll is not governed by statute or special rule, the chairman of a meeting is the proper authority to fix the time and place for the taking of a poll. The same rule applies to registered companies also. 15 B. 164. F

(10) Poll—Demand to be in writing.

A poll should always be demanded in writing, whether the articles so require or not. Evans and Cooper, p. 79. G

(11) Voting on poll—Method.

On a poll, votes may be given personally or by proxy. *Mc Millan v. Le Roi Mining Co.*, (1906) 1 Ch. 331. H

(12) Polling—Chairman's powers.

The Chairman cannot direct that a poll shall be taken by means of polling papers signed by the members and delivered at the Company's office. *Mc Millan v. Le Roi Mining Co.*, (1906) 1 Ch. 331. I

9.—“*Chairman.*”

(1) Chairman—Appointment of.

The articles usually provide that the chairman of the board shall be the chairman at general meetings; failing this, the meeting elects a chairman from among the directors, or failing them, from among the members present. Cooper and Evans, p. 76 citing *National Dwellings Society v. Sykes*, (1894) 3 Ch. 159. J

(2) Duties of chairman.

The duties of a chairman are to preserve order, to conduct proceedings regularly, and to take care that the sense of the meeting is properly ascertained with regard to any question before it. (*Ibid.*) K

(3) Moving closure and putting to vote—Chairman's power.

When the views of the minority have been heard, the chairman may move the closure, and if the motion is carried by the meeting he may declare the discussion closed and put the question to the vote. *Wall v. London and Northern Assets Corporation*, (1898), 2 Ch. 469 (C. A.). L

(4) Signature by chairman—When to be made.

The chairman's signature need not be made at the meeting. *West London Railway Co. v. Bernard*, Dav. and Mer. 397. *Re Cawley & Co.*, 49 Ch. D. 209 and other cases cited in footnote (a), p. 262, Halsbury, Vol. V. M

10.—“*A declaration....conclusive evidence of the fact.*”

(1) Chairman—Authority to decide incidental questions.

The chairman of a general meeting has *prima facie* authority to decide all incidental questions arising thereat and necessarily requiring immediate decision. *India Zoedone Co.*, 26 Ch. D. 70. N

(2) Chairman's declaration, *prima facie* evidence.

The entry made by him in the minute book of the result of a poll, or of his decision on all such questions, although not conclusive, is *prima facie* evidence of that result, or of the correctness of that decision, and the burden of displacing that evidence is thrown on those who impeach the entry. *Indian Zoedone Co.*, 26 Ch. D. 70. O

10.—“A declaration . . . conclusive evidence of the fact ”—(Concluded).

(3) Chairman's declaration, conclusive how far.

(a) The declaration of the chairman that a special resolution has been carried on a show of hands (no poll having been demanded) is, at any rate, in the absence of fraud, conclusive and the Court will not go behind it by inquiring into facts. *Arnot v. United African Lands*, (1901) 1 Ch. 518. P

(b) The declaration of a chairman at a special general meeting that the special resolution has, on a show of hands, been carried is not 'conclusive evidence' of the fact so as to preclude a share-holder from disputing the validity of the resolution by legal proceedings on the ground, for instance, that it has not been carried by the Statutory majority. *Young v. South African &c., Syndicate*, (1896) 2 Ch. 268; but see *Hadleigh v. Castlemine*, (1900) 2 Ch. 419. Q

(4) Point of law—Erroneous declaration.

A declaration which is erroneous in point of law is not conclusive. *Caratal New Mines*, (1902) 2 Ch. 498. R

78. In default of any regulations as to voting, every member shall have one vote, and, in default of any regulations as to summoning general meetings, a meeting shall be held to be duly summoned of which seven days'² notice³ in writing has been served on every member in manner in which notices are required to be served by the table marked A in the first schedule hereto.

Provision where no regulations as to meetings.

In default of any regulations as to the persons to summon meetings, five members shall be competent to summon the same, and, in default of any regulation as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 67, Companies (Consolidation) Act, 1908. S

1.—“Regulation.”

Regulations that have become inoperative.

—are to be treated as if there had been no regulations. *Brick and Stone Co.*, (1878) W.N. 140=22 Sol. J. 625. T

2.—“Seven days.”

“Seven days.”

—mean seven clear days. *Railway Sleeper's Co.*, 29 Ch. 204. U

3.—“Notice.”

(1) Rules for drawing up notice convening meeting.

i. The meeting has no power to pass any resolution outside the scope of notice. *Re Bridport Old Brewery Co.*, (1887) 2 Ch. Ap. 191; *Vale of Neath Brewery case*, *Lawes'* case, 1 De G.M. and G. 421; *Isle of Wight Ry. Co. v. Tahourdin*, 22 Ch. D. 320.

3.—“Notice”—(Continued).

ii. The notice must fairly disclose the purpose for which the meeting is convened. *Kaye v. Croydon Tramways Co.*, (1898) 1 Ch. 358, *Tissen v. Henderson*, (1899) 1 Ch. 861.

iii. At the same time, it must not be construed with excessive strictness. Per *Selwyn, J.* in *Wright's case*, 12 Eq. 345 (f.n.). Y

(2) Sufficiency of notice depends on circumstances of case.

The sufficiency of a notice is to be determined according to the circumstances of each case. *Normandy v. Ind. Coope Co.*, (1908), 1 Ch. 84. W

(3) Director's report accompanying notice—Mention of business in—Sufficiency.

Where the Director's report, which accompanied the notice, mentioned special business not referred to in the notice, both documents together gave sufficient notice of such business. *Boschoek Proprietary Co. v. Fuke*, (1908) 1 Ch. 148. X

(4) Resolution, not necessarily to be identical with notice.

A resolution need not be in the identical terms of the resolution specified in the notice. For instance, where a notice specifies a resolution to the effect that the director's remuneration shall be 40 percent of certain profits, and it is passed at 30 percent. the alteration does not invalidate the resolution. *Torback v. Lord Westbury*, (1902) 2 Ch. 871. Y

(5) General meeting, notice of—Alterations to be proposed not mentioned—Insufficiency.

Where the notice was given of an extraordinary meeting for the purpose of altering the articles of a Company, the general nature of the business in the circumstances was held to be insufficiently indicated, since the nature of the alterations proposed did not appear in the notice. *Normandy v. Ind. Coope & Co.*, (1908) 1 Ch. 84. Z

(6) Notice, to whom to be sent.

The notice must be sent to all entitled to attend the meeting. If this is not done, any resolution passed at the meeting will be invalid. *Smith v. Darby*, 2 H.L.C. 789; *Re v. Langhorn*, 6 N. and M. 203. A

(7) Address to be given in notice.

It is not necessary that the notices should be addressed exactly in the same way as the member's address appears upon the register; but the member's place of abode must be given with sufficient accuracy. *Liverpool Co. v. Houghton*, 23 W.R. 98. B

(8) Notice to representatives—Necessity.

Representatives of a bankrupt or deceased share-holder are not entitled to receive notices unless they have become members by formal registration. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656. C

(9) Notice to share-holders abroad unnecessary.

Notices need not be sent to share-holders who choose to reside abroad. *Union Hills Silver Co.*, 22 L.T. 400; *Smith v. Darby*, 2 H.L.C. 789. D

(10) Notice of resolution, to indicate needlessness of confirmation.

The notice convening a meeting for the purpose of passing an extraordinary resolution must contain something to show that it is proposed to pass a resolution as will not require confirmation. *Bridport Old Brewery Co.*, 2 Ch. App. 191. E

3.—“Notice”—(Concluded).

(11) Special resolution—Single notice for two meetings—Sufficiency.

A provision in the articles that the two meetings necessary in the case of a special resolution may be convened by the same notice is good. *Re North of England Steamship Co.*, (1905), 2 Ch. 15. F

79. A copy of every special resolution that is passed by any Company under this Act shall be printed and forwarded to the Registrar of Joint-Stock Companies and be recorded by him.

Registration of special resolutions.

If such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the Company shall incur a penalty not exceeding twenty rupees for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded; and every director and manager of the Company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

(Note).

Corresponding English Law.

This section corresponds to S. 70, cls. (1) and 6 of the Companies (Consolidation) Act, 1908. G

80. Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to, or embodied in, every copy of the articles of association that may be issued after the passing of such resolution. Where no articles of association have been registered, a copy of every special resolution shall be forwarded in print to any member requesting the same on payment of one rupee or such less sum as the Company may direct.

Copies of special resolutions to be embodied in articles of association.

If any Company makes default in complying with the provisions of this section or section 76, it shall incur a penalty not exceeding twenty rupees for each copy in respect of which such default is made; and every director and manager of the Company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

(Note).

Corresponding English Law.

This section corresponds to S. 70, cls. 2, 3, 4 and 5 of the Companies (Consolidation) Act, 1908. H

81. Any Company under this Act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in British India; and every deed signed by such attorney on behalf of the Company and under his seal shall be binding on the Company and have the same effect as if it were under the common seal of the Company.

(Note).

Corresponding English Law.

This section corresponds to S. 78, Companies (Consolidation) Act, 1908. I

82. The Local Government may appoint one or more competent inspectors to examine into the affairs of any Company under this Act, and to report¹, thereon in such manner as the Local Government may direct upon the applications following (that is to say) :—

Examination of
affairs of Company
by Inspectors.

- (a) In the case of a banking or any other Company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the Company for the time being issued;
- (b) In the case of any Company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the Company as members.

(Note).

Corresponding English Law.

This section corresponds to S. 109, cl. 1, Companies (Consolidation) Act, 1908. J

1.—“ To examine....and to report. ”

The inquiry—Report—Nature.

The inquiry is not in the nature of a judicial proceeding, and therefore prohibition will not lie to prevent it being held. The report cannot be made the foundation of any subsequent action; it is merely evidence of the opinion of the inspectors. *Re Grosvenor Hotel Co.*, (1897) 76 L.T. 387. K

83. The application shall be supported by such evidence as the Local Government may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same.

Application for
inspection to be sup-
ported by evidence.

The Local Government may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors.

(Note).

Corresponding English Law.

This section corresponds to S. 109, cl. (2), Companies (Consolidation) Act, 1908. L

84. It shall be the duty of all officers and agents of the Company to produce for the examination of the inspectors all books and documents in their custody or power.

Inspection of books.

Any inspector may examine upon oath the officers and agents of the Company in relation to its business.

If any such officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the Company, he shall incur a penalty not exceeding one hundred rupees in respect of each such offence.

(Note).

Corresponding English Law.

This section corresponds to S. 109, cls. (3), (4) and (5), Companies (Consolidation) Act, 1908. M

85. Upon the conclusion of the examination, the inspectors shall report their opinions to the Local Government. Such report shall be written or printed as the Local Government directs.

Result of examination how dealt with.

A copy shall be forwarded by the Local Government to the registered office of the Company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them.

All expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose application the inspectors were appointed, unless the Local Government shall direct the same to be paid out of the assets of the Company, which the Local Government is hereby authorised to do.

(Note).

Corresponding English Law.

This section corresponds to S. 109, cls. (6) and (7) of the Companies (Consolidation) Act, 1908. N

Power of Company to appoint inspectors.

86. Any Company under this Act may, by a special resolution, appoint inspectors for the purpose of examining into the affairs of the Company.

The inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Local Government, with this exception, that, instead of making their report to the Local Government, they shall make the same in such manner and to such persons as the Company in general meeting directs.

The officers and agents of the Company shall incur the same penalties in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspectors had been appointed by the Local Government.

(Note).

Corresponding English Law.

This section corresponds to S. 110, Companies (Consolidation) Act, 1908. **O**

87. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the Company into whose affairs they have made inspection, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Report of inspectors to be evidence.

(Note).

Corresponding English Law.

This section corresponds to S. 111, Companies (Consolidation) Act, 1908. **P**

88. Every prospectus¹ of a Company, and every notice inviting persons to subscribe for shares in any Joint-Stock Company, shall specify the dates of and the names of the parties to any agreement enforceable by law which has been entered into by the Company, or the promoters², directors, or trustees thereof, before the issue of such prospectus or notice (whether subject to adoption by the directors or the Company, or otherwise), and which might reasonably influence³ a person in determining whether he would or would not become a share-holder⁴ in the Company; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the Company knowingly issuing the same, as regards any person taking shares in the Company on the faith of such prospectus⁵ unless he has had notice of such contract.

Prospectus, etc., to specify dates and names of parties to certain prior contracts.

(Notes).

English Law.

See Ss. 80 and 81, Companies (Consolidation) Act, 1903.

Q

1.—“Prospectus.”

(1) What it means.

“Prospectus” means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a Company. S. 285, Companies (Consolidation) Act, 1903. See for further notes, Evans and Cooper, p. 101. R

(2) Contents of prospectus, to be true.

It is a desirable, though not essential, that a prospectus should contain a true statement of every fact which is material to be made known to persons invited to take shares, in order to enable them to form a judgment as to the policy of so doing. But, there must be no actual misrepresentation of a material fact, and no omission so great as to falsify what is stated, nor must a false impression be intentionally given even if the individual statements by which that impression is conveyed are true if taken one by one. *Aaron Reefs v. Twiss*, (1896) A.C. 273; *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421. S

(3) Issue of prospectus—Company bound by statements therein.

The issuing of a prospectus is an act comprised within the management and conduct of the Company's business. The statements made in the prospectus are representations of the Company. 2 Ind. Jur. N. S. 296. T

(4) Portion of truth, amounts to falsehood.

A statement of a portion of the truth is neither more nor less than a false statement. *Aaron Reefs v. Twiss*, (1896) A.C. 273 (287), Per Lord Watson. U

(5) Prospectus—Material misrepresentation—No laches—Rescission of contract.

The prospectus though issued by the promoters before the formation of the Company, was the basis of the contract between the Company and the defendant for allotment of shares, and if an alleged misstatement therein were relied on by the defendant and were material to the contract, he would, in the absence of laches on his part depriving him of the right, be entitled to rescind the contract and repudiate the shares. 4 C.W.N. 369. Y

2.—“Promoters.”

(1) Definition.

A promoter is one who undertakes to form a Company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose. Per Cockburn, C.J., in *Twycross v. Grant*, 2 C.P.D. 541. W

(2) What the term connotes.

The term ‘promoter’ is not a term of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a Company is generally brought into existence. Bowen, L.J. in *Whaby Bridge Co. v. Green*, 5 Q.B.D. 111. X

2.—“Promoters”—(Continued).

(3) Meaning.

The word “promoter” has no very definite meaning. As used in connection with Companies the term “promoter” involves the idea of exertion for the purpose of getting up and starting a Company or what is called “floating” it, and also the idea of some duty towards the Company imposed by or arising from the position which the so-called promoter assumed towards it. Per *Londby, J. in Emma Mining Co. v. Lewis*, 4 C.P.D. 407. Y

(4) Question whether a person is promoter, one of fact in each case.

Whether or not a person is a promoter is a question of fact, and must be determined with regard to the special circumstances of each particular case, and if the facts show that a particular person has taken an active part in the formation of a Company, he will be liable as a promoter. *Baquall v. Carlton*, 6 Ch. D. 371. Z

(5) Promoter, need not be concerned with every business.

It is not necessary that a man should have been concerned with all or even a major part of the business involved in forming a Company to constitute him a promoter. *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918. A

(6) Solicitor, not promoter.

A solicitor who is concerned as such in the formation of a Company, and has no interest therein except the right to be paid for his labour, is not a promoter. *Great Wheal Polgooth*, 53 L.J. Ch. 42; *Emma Silver Mining Co. v. Lewis*, 4 C.P.D. 396; *Twycross v. Grant*, 2 C.P.D. 541. B

(7) Promoter, entitled to remuneration alone.

He is only entitled to the remuneration agreed upon. *Evans and Cooper, citing Imperial Mercantile Credit Association v. Coleman*, 6 H.L. 189. C

(8) Promoters—Benefit under contract in memorandum and articles—Absence of.

The memorandum and articles of association of a Company embody a contract between the share-holders and the Company and possibly between the directors and the share-holders and do not constitute any contract between the Company and its promoters. 10 Bom. L.R. 141=3 M. L.T. 197. D

(9) Promoter—Fiduciary relationship of.

A promoter of a Company stands in a fiduciary relationship to it, and is accountable to it in the same way as if the relationship of principal and agent, or trustee and *cestui que trust* had existed. *Lidney and Wighpool Co. v. Bird*, 33 Ch. D. 85; *New Sombrero & Co. v. Erlanger*, 5 Ch. D. 73; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918. E

(10) Promoter not entitled to secure profits for himself.

The promoter is not entitled to secure, either directly or indirectly, any profit for himself out of the formation of the Company without the knowledge of the Company, which must have an opportunity of exercising, through fair and independent directors, an independent judgment

2.—“Promoters”—(Concluded).

upon all matters which affect its interests. *Erlanger v. New Sombrero Phosphate Co.*, 3 A.C. 1218; *Gluckstein v. Barnes*, (1900) A.C. 240; *Re Leeds and Handley Theatres*, (1902) 2 Ch. 809. F

(11) Secret profits—Promoter's accountability.

All secret profits belong to the Company, and the promoter is liable to account for them to the Company. *Imperial Mercantile Credit Association v. Coleman*, 6 H.L. 189. G

(12) Secret profits—Sale of private property to Company—Proof of intention.

(a) If promoters are to be made liable for secret profits derived by them from a sale to a Company of a property belonging to such promoters, it must be proved that there was an intention on the part of the promoters, when the promoters bought the property so to resell it, *Evans and Cooper*, pp. 103, 104. H

(b) Where certain persons who acquired a property had, at the time of such acquisition, no present intention of reselling it to, or forming, a new Company, although such new Company was formed shortly afterwards with such persons as directors, it was held that, although the directors of the new Company had been guilty of a breach of duty in not disclosing what profit had been made by them, and although the Company might have had a right to rescind the contract for purchase, if matters had not been altered since the right arose, yet, the directors could not be ordered to repay the secret profit made by them. *Re Lady Forrest Gold Mine*, (1901) 1 Ch. 582. I

(13) Promoter—Secret profits—Right to be re-imbursed of all reasonable expenses.

A promoter who is compelled by the Company to account for secret profits, is entitled to deduct all reasonable expenses incurred by him, and is only liable for net profits. *Bagnall v. Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918. J

(14) Payment of registration fee—Promoter's right to recover.

The mere fact that a promoter pays the registration fees and stamp duty on the registration of a Company does not in itself entitle him to recover them from the Company. *National Motor Mail Coach Co.*, (1908) 2 Ch. 515 (overruling on this point *English and Colonial Produce Co.*, (1906) 2 Ch. 435). K

3.—“Which might reasonably influence.”

The words “which might reasonably influence.”

—give effect to the decisions of *Brett, L.J.*, *Cockburn, C.J.*, *Coleridge, C.J.*, *Lindley and Grove, J.J.*, in the following cases, viz., *Gover's case*, 1 Ch. D. 200; *Twycross v. Grant*, 2 C.P.D. 539 (546); *ibid.*, 2 C.P.D. 485. See *Russell and Bayley*, 3rd Ed., p. 120. L

4.—“Knowingly issuing.”

Meaning of the words.

These words will include the case where the notice of the contracts in question has been omitted under the *bona fide* belief that it was not necessary to specify them. *Twycross v. Grant*, 2 C.P.D. 469. M

5.—“Taking shares on the faith of such prospectus.”

“Taking shares on the faith of such prospectus”—Construction.

Giving a reasonable meaning to this not very happily worded expression, no person can be said to have taken shares on the faith of a prospectus, except a person who can prove to the satisfaction of a jury that he took his shares on the faith of their being no such contract, as that omitted to be disclosed, and that, if such contract had been disclosed to him, he would not have taken his shares. Per *Thesiger, J.* in *Salboin v. Metcalfe*, 5 C.P.D. 455. N

Miscellaneous.

(1) Remedy given by section.

The—is a personal remedy against the persons named in it, and it does not give a share-holder a right to rescind his contract to take shares. *Gover's case*, 20 Eq. 114; 1 Ch. D. 182; *Sullivan v. Metcalfe*, 5 C.P.D. 465. O

(2) Remedy to whom available—Bond-holder not entitled.

Only a share-holder—not a bond-holder—can avail himself of the section. *Cornell v. Hay*, L.R. 8 C.P. 328. P

(3) Measure of damages.

The—recoverable by the plaintiff in an action for deceit against director on account of false statements in a prospectus, is the difference between the price paid him for shares and the real value at the time of allotment; and such value must be ascertained not by the market value of the shares at the time but, by the light of subsequent events, including the result of winding up of the Company. *Peek v. Derry*, 37 Ch. D. 541 (590); *Arkwright v. Newbold*, 17 Ch. D. 301; *Twyecross v. Grant*, 2 C.P.D. 469; *Arnison v. Smith*, 41 Ch. D. 318 (363). Q

Notices.

89. Any summons, notice, order, or other document ² required

Service of notices 1 to be served upon the Company may be served on Company. by leaving the same, or sending it through the post by a registered letter addressed to the Company, at their registered office; and any notice to the Registrar of Joint-Stock Companies may be served by sending it to him through the post by a registered letter, or by delivering it to him, or by leaving it for him at his office.

(Notes).

Corresponding English Law.

The first paragraph of this section corresponds to S. 116 Companies (Consolidation) Act, 1908. R

1.—“Service of notices.”

(1) Service of Summons—Applicability of S. 436, C.P.C., 1882 [=O. 29, r. 2, C.P.C. (1908)].

The service of a summons on a Company registered under this Act, is regulated by S. 89 of this Act and S. 436, C.P.C. (1882) [=O. 29, r. 2, C.P.C. (1908) does not apply.] 12 Bom. L.R. 730.

1.—“Service of notices” —(Concluded).

For further notes, *vide* notes under the heading 2.—“TO WHICH ALL COMMUNICATIONS...MAY BE ADDRESSED UNDER S. 63,” *supra* and notes under heading and notice S. 77, *supra*. S-T

(2) Service on clerk, when good.

In the absence of the secretary, such notice may be given at the registered office to a clerk in charge, and is then a communication to the Company. *Truman's case*, (1894) 3 Ch. 272. U

(3) Managing director, notice to—when good.

Notice to a managing director, in that character, affecting the business of the Company under his management, is notice to the Company itself. *Jaeger's Sanitary Co. v. Walker*, 77 L.T. 180. Y

(4) Service at branch establishment insufficient.

A summons in Criminal proceedings, as well as writs in Civil proceedings, must be served at the registered office, as required by the section and not at a branch establishment. *Pearks v. Richardson*, (1902) 1 K.B. 91. W

(5) Secretary of two Companies—Knowledge as secretary of one Company—Whether notice to other Company.

Where a man is secretary to two Companies, a fact which comes to his knowledge as secretary of one is not notice to him as secretary of the other, unless it was his duty to the first Company to communicate it to the second. *Fenwick, Stobart & Co.*, (1902) 1 Ch. 507. X

(6) Verbal notice.

A—, to the company, *e.g.*, of the withdrawal of an application for shares, is good. *Wilson's case*, 20 L.T. 962. Y

(7) Death of member—Mere rumour heard by a Company's official—Information by person not interested—Whether amounts to knowledge of the fact by Company.

The communication to the Company of a member's death ought to be a formal communication to the Company of the fact by some one authorised to make it as in some way representing the deceased. A mere rumour reaching the ears of an official of the Company or actual information given by some one in no way interested in the matter will not cause the Company to have knowledge of the fact. 4 Bom.L.R. 215. Z

(8) Death of member—Non-communication of—Notice sent to registered address—Sufficiency.

Where a member of a Company has died, and his death has not been communicated to the Company, all notices which ought to be served upon him are duly served if they are sent addressed to his registered address whether they actually come into the hands of his executors and other representatives or not. 4 Bom. L.R. 215. A

2.—“Document.”

Document, Meaning.

A ‘document’ includes summons, notice, order and other legal process. See S. 285, Companies (Consolidation) Act, 1908. B

90. Every document to be served by post on the Company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and, in proving service of such document, it shall be sufficient to prove that such document was properly directed, and that it was put as a registered letter into the post office.

Rules as to notices
by letter.

91. Any summons, notice, order, or proceeding requiring authentication by the Company may be signed by any director, secretary, or other authorised officer of the Company, and need not be under the common seal of the Company; and the same may be in writing or in print, or partly in writing and partly in print.

Authentication of
notices by Company.

(Note).

Corresponding English Law.

This section corresponds to S. 117, Companies (Consolidation) Act, 1908. C

Legal Proceedings.

92. Every Company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the Company, and of the directors¹ or managers of the Company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose; and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings.

Evidence of pro-
ceedings at meet-
ings.

Until the contrary is proved, every general meeting of the Company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had to have been duly passed and had, and all appointments of directors, managers, or liquidators shall be deemed to be valid, and all acts done by such directors, managers, or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications.

Explanation ²—Nothing in this section shall be deemed to give validity to acts done by a liquidator after his appointment has been shown to be invalid.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 71, Companies (Consolidation) Act, 1908.

D

1.—“*Proceedings of....directors.*”

(1) Board meetings.

The business of a Company is usually transacted by the directors at board meetings and unless the articles provide otherwise, the directors must act together as a Board, and cannot act without meeting. *D'Arcy v. Tamer Reg.*, 2 Ex. 158; *Haycroft Gold Reduction Co.*, (1900) 2 Ch. 230.

E

(2) Board meetings, ordinary and extraordinary.

Ordinary board meetings are usually held at fixed intervals (e.g., a week) at some fixed hour and place; extraordinary board meetings are usually summoned by the secretary or one or more of the directors. *Evans and Cooper*, p. 81.

F

(3) Notice to directors.

No notice need be given to the directors of such ordinary board meetings, but, if they are not held at such fixed intervals, notice must, to ensure a valid meeting, always be given to all directors. *Portuguese Copper Mines*, *Steele's case*, 42 Ch. D. 160.

G

(4) Directors residing abroad.

No notice need be given to—. *Halifax Sugar Co. v. Franklyn*, 59 L.J. Ch. 591.

H

(5) Contents of notice.

The notice need not state what business is to be transacted, unless it is so provided in the regulations. *Campagne de Mayville v. Whitley*, (1896) 1 Ch. 788.

I

(6) Quorum at Board meetings.

(i) The articles usually provide the number of directors required to constitute quorum, but, if not so prescribed, the number who usually act in conducting the business of the Company will constitute the quorum. *Tavistock Ironworks Co.*, *Lyster's case*, 4 Eq. 233; *Re Bank of Syria*, (1901), 1 Ch. 115.

J

(ii) A majority of the whole board may constitute a quorum, *York Tramways Co. Willows*, 8 Q.B.D. 685.

K

(7) Want of quorum—Meeting invalid.

A board meeting of a number less than the quorum is invalid. *Faure Electric Accumulator*, 40 Ch. D. 141.

L

(8) Directors—Board of directors—Quorum of three members—Only one member remaining on board—His powers—Court's directions.

A resolution of the directors of a Company provided that three members should form a quorum at a meeting of the directors. Of the three directors, two resigned, leaving only one in charge of the affairs of the Company. The accounts of the Company having been prepared, the question arose as to how, and who should pass the accounts. One

1.—“*Proceedings of . . . directors*”—(Continued).

director applying to the Court for directions, it was *held* that three courses were open to him, *viz.*, (i) The director can get five members of the Company under S. 78 of the Act ; (ii) The director himself can call an extraordinary general meeting and (iii) The director can move the Court to call a general meeting. S Bom. L.R. 478. M

(9) Director not competent to vote—Interested matter—*Quorum*.

Where a director may not vote on any matter in which he is interested, he does not count towards a *quorum* for such business. *Re Greymouth Point Elizabeth Co.*, (1904) 1 Ch. 32. N

(10) Authority to act in spite of vacancy, no authority to act without *quorum*.

A power given to directors to act in spite of vacancies will not authorize them to act when no *quorum* is formed. *Newhaven Local Board*, 30 Ch. D. 350. O

(11) Meeting, invalid—Innocent third parties, not affected.

The invalidity of a meeting will not affect persons dealing with the company without notice. *Royal British Bank v. Tarquand*, 6 E. & B. 327 ; *County of Gloucester Bank v. Rudry Collier Co.*, (1895) 1 Ch. 629. P

(12) Ratification—Transactions at invalid meeting—Reasonable time.

The company may ratify the transactions of an invalid meeting at a subsequent board meeting, provided it does so within a reasonable time. *Portuguese Copper Mines, Badman's and Bosanquet's cases*, 45 Ch. D. 16. Q

(13) Director—Exclusion from acting as—Right of action.

A director can bring an action against other directors for an injunction to restrain him from wrongfully excluding them from acting as director. *Pulbrook v. Richmond Mining Co.*, 9 Ch. D. 610. R

(14) Director—Act done at meeting without him—Subsequent meeting—Voting for confirmation of minutes—Responsibility.

A director does not make himself responsible for an act done at a meeting at which he was not present, and which is complete without further confirmation, merely by voting at a subsequent meeting for the confirmation of the minutes. *Burton v. Bevan*, (1908) 1 Ch. 240. S

(14-a) Delegation by Directors.

1. Directors can delegate their powers to a committee of their number, if authorised so to do by the articles, but not otherwise. *Howard's case*, 1 Ch. App. 561. T

2. The committee need not consist of more than one director. *Re Taurine & Co.*, 25 Ch. D. 118. U

(15) Managing director, professing to act under delegated powers—Other directors empowered to delegate—Dealings with *bona fide* stranger—Binding nature.

Where a director of a company purports to do, as managing director, an act the doing of which his co-directors have, under articles, power to delegate to him, a person dealing with him *bona fide*, and in the ordinary course of business, may assume that he has the power which he professes to have. *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93. V

1.—“*Proceedings of...directors*”—(Continued).

(16) Director's capacity—How far fiduciary.

A director of a company though he may occupy a fiduciary position with regard to the share-holders collectively, holds no such positions as regards individual share-holders. 18 A. 56=15 A.W.N. 58 (*referring to Gilbert's case*, L.R. 5 Ch. 559, *Gower's case*, L.R. 6 Eq. 77). W

(17) Director of public Company—Profit to himself—Applicability of rule prohibiting.

Although a director of a public company is always clothed with a fiduciary character in regard to the dealings of any property of the Company in his capacity of director, the rule that a trustee is not allowed to make a profit of his trust does not apply to such a director *qua* director only. 6 B.L.R. 278. X

(18) Directors—Power to contract for personal benefit.

There is nothing to prevent the directors of a Company from entering into a contract with the Company for their own benefit. 10 P.R. (1905)=100 P.L.R. (1905). Y

(19) Partner of director—Claim for remuneration for work done as a solicitor, allowable.

Where a partner of one of the directors did work for the directors as solicitor and there was nothing to show that he had not been duly appointed by the directors, his claim in respect of such work was allowed. 5 B.L.R. 195. Z

(20) Directors, responsible for management with aid of agent—Delegation to agent—Agent's fault—Director's liability.

Directors are responsible for the management of their Company where, by the articles of association, the business is to be conducted by the Board with the assistance of an agent. They cannot divest themselves of their responsibility by delegating the whole management to the agent and abstaining from all enquiry. If he proves unfaithful under such circumstances, the liability is theirs, just as much as they themselves had been unfaithful. 9 B. 373. A

(21) Company authorized to deal, in cotton &c., local trade—Purchase of other Company's shares—*Ultra vires*—Director's liability.

Where a Company was formed with the object of doing the business of commission agency and general trading in cotton, &c., and where its memorandum laid down 'if found desirable, the Company may effect purchases of cotton and produce in Bombay and ship to England and carry on such local trade as may seem profitable,' it was held that the memorandum did not justify the directors in dealing in the shares of other Companies and that it was *ultra vires*. The directors were held liable to replace the moneys they had misapplied in the purchases of such shares. 18 B. 119. B

(22) Shares already issued—Cancellation.

Directors have no power to cancel shares already issued to a share-holder at his request and so to reduce capital. 20 B. 654 (*following* 18 B. 152). C

1.—“*Proceedings of....directors*”—(Concluded).

(23) Directors empowered to declare dividend—Share-holders dissatisfied with directors—Interference—Remedy.

Where, under the articles, the directors were empowered, before recommending a dividend, to set aside out of the profits of the Company as they thought proper as a reserve fund, and the disposal of profit were entirely entrusted to them, to allow the share-holders to deal with them would be a direct contravention of the article. Nor could the share-holders decide the question as to the amount of the dividend. The remedy of the share-holders, is if they were dissatisfied with the directors, was to remove from office, or to alter the articles of association. 10 B. 415. D

(24) Ratification, whether cures similar acts done subsequent thereto.

The ratification by a Company of particular acts done by its director in excess of their authority does not extend the powers of the directors so as to give validity to acts of a similar character done subsequently. 3 C. 280. E

2.—“*Explanation.*”

(1) Source.

The explanation to this section is based on the ruling in the English case of *Bridport Old Brewery Co.*, 2 Ch. 191. F

(2) Irregularity in appointment of directors.

If third parties having no knowledge of any—, act with them, the company will be bound. *County Assurance Co.*, 5 Ch. 288; *Mahoney v. East Holyford Mining Co.*, 7 H.L. 869. G

(3) Acts as against director himself—Allotment of shares to himself—Confirmation to his becoming director—Liability.

Where the articles of association provided that the number of directors should be not less than three, and also that any casual vacancy occurring on the board might be filled up by the board and that the continuing board might act notwithstanding any vacancy in their body, and, upon a casual vacancy having occurred, the defendant who had shares allotted to him by the two directors, became subsequently a director and confirmed the resolution to himself and joined in a resolution that the shares allotted to him should be paid in full forthwith, he was held liable to pay the shares allotted to him. *York Tramway Co. v. Willows*, 8 Q.B.D. 685; *Russell and Bayley*, 3rd Ed., p. 123. See, also, 8 Bom. L.R. 478. H

(4) Directors—Informality in their proceedings—Estoppel.

Directors cannot take advantage of any informality in their proceedings in which they have themselves participated and are estopped, as between themselves, and their company, even from saying that they have been improperly appointed, if they had acted after their appointment. *Tyne Mutual Steamship Ins. Association v. Brown*, 74 L.T. 288; *York Tramways Co. v. Willows*, 8 Q.B.D. 685 C.A. I

93. Where a limited Company ¹ is plaintiff ² in any suit, if it appears from the evidence adduced that there is reason to believe ³ that, if the defendant be successful in his defence, the assets of the Company will be insufficient to pay his costs, any Judge having jurisdiction in the matter may require sufficient security ⁴ to be given for such costs, and may stay all proceedings until such security is given.

Provision as to costs in suits brought by certain limited Companies.

(Notes).

Corresponding English Law.

This section corresponds to S. 278, Companies (Consolidation) Act, 1908. J

1.—“A limited Company.”

Liquidator.

Where a——is the applicant and not the Company, no security can be ordered. *Strand Wood Co.*, (1904) 2 Ch. 1. K

2.—“Plaintiff.”

(1) Plaintiff in cross suit.

A——or what is virtually a cross-suit does not come under the section. *Buckley*, 9th Ed., p. 555. L

(2) Security when refused.

Where a company was plaintiff in a suit to set aside a policy on which the defendant in the suit had already brought against the company an action at law, which was still pending, security was refused. *Accidental, etc.*, *Insurance Co. v. Mercati*, 3 Eq. 200, *Buckley*, 9th Ed., p. 555. M

(3) Company, respondent in appeal.

A company who is a respondent in an appeal against the decision in an action where the company, as plaintiff, succeeded, is not a plaintiff for the purposes of security for the costs of the appeal. *Star Fire v. Davidson*, 4 Fraser 997. N

(4) Company appealing against winding-up order.

A——, can be ordered to furnish security for costs. *Drummond Fuel Co.*, 13 Ch. D. 400 (412); *Photographic Artist's Association*, 23 Ch. D. 370. O

3.—“Reason to believe.”

Liquidation.

The fact of being in——, supplies, ‘reason to believe’ unless evidence is given to the contrary. *Northampton Coal Co. v. Midland Wagon Co.*, 7 Ch. D. 500; *Pure Spirit Co. v. Fowler*, 25 Q.B.D. 235. P

4.—“May require sufficient security.”

(1) Security up to a certain stage.

The Court may order to furnish——in the proceedings and then allow the application to be renewed. *Western of Canada Oil Co. v. Walker*, 10 Ch. 628. Q

(2) Security—Time for ordering to give.

The Court may order security to be given at any time of the proceedings. *Lydney & Co. v. Bird*, 23 Ch. D. 358. R

94. In any suit brought by the Company against any member
 Plaintiff in suits to recover any call or other moneys due from
 against members. such member in his character of member it shall
 be sufficient to allege that the defendant is a member of the Com-
 pany and is indebted to the Company in respect of a call made or
 other moneys due whereby a suit has accrued to the Company.

Alteration of Forms.

95. The forms set forth in the second schedule hereto, or
 Forms to be used. forms as near thereto as circumstances admit,
 shall be used in all matters to which such forms
 refer.

The Governor-General in Council may, from time to time,
 Governor-General in Council may make such alterations in the tables and forms
 alter forms. contained in the first schedule hereto, so that he
 does not increase the amount of fees payable to the
 Registrar in the said schedule mentioned, and in the forms in the
 second schedule, or make such additions to the last-mentioned
 forms, as he deems requisite.

Any such table or form, when altered, shall be published in the
 Gazette of India, and, upon such publication being made, such table
 or form shall have the same force as if it were included in the
 schedule to this Act; but no alteration made by the Governor-
 General in Council in the table marked A contained in the first
 schedule shall affect any Company registered prior to the date of
 such alteration, or repeal, as respects such Company, any portion of
 such table.

(Note).

Corresponding English Law.

This section corresponds to S. 118, Companies (Consolidation) Act, 1908. S

Arbitrations.

96. Any Company under this Act may, from time to time, by
 Power for Com- writing under its common seal, agree to refer, and
 panies to refer mat- may refer, to arbitration any matter whatsoever
 ters to arbitration. in dispute between itself and any other Company
 or person; and the Companies, parties to the arbitration, may dele-
 gate to the person or persons, to whom the reference is made, power
 to settle any terms or to determine any matter capable of being
 lawfully settled or determined by the Companies themselves, or by
 the directors or other managing body of such Companies.

(Note).

Corresponding English Law.

This section corresponds to S. 119, cls. (1) and (2), Companies (Consolidation) Act, 1908. T

97. The Companies jointly, but not otherwise, from time to time, by writing under their respective common seals, may add to, alter, or revoke any agreement for reference in accordance with this Act theretofore entered into between the Companies, or any of the terms, conditions, or stipulations thereof.

Power to alter or
revoke agreements
for reference.

(Note).

Corresponding English Law.

This section corresponds to S. 3, Railway Companies Arbitration Act, 1859. U

98. Every reference or agreement in accordance with this Act, except so far as it is, from time to time, revoked or modified in accordance with this Act, shall bind the Companies, and may and shall be carried into full effect.

Agreements to be
carried into effect.

(Note).

Corresponding English Law.

This section corresponds to S. 4, Railway Companies Arbitration Act, 1859. V

99. Where the Companies agree, the reference shall be made to a single arbitrator.

Reference to arbi-
trator.

(Note).

Corresponding English Law.

This section corresponds to S. 5, Railway Companies Arbitration Act, 1859. W

100. Except where the Companies agree that the reference shall be made to a single arbitrator, the reference shall be made as follows, to wit:—

Reference to two
or more arbitrators.

where there are two Companies, the reference shall be made to two arbitrators ;

where there are three or more Companies, the reference shall be made to so many arbitrators as there are Companies.

(Note).

Corresponding English Law.

This section corresponds to S. 6, Railway Companies Arbitration Act, 1859. X

101. Where there are to be two or more arbitrators, every Company shall by writing under their common seal appoint one of the arbitrators, and shall give notice in writing thereof to the other Company or Companies.

Appointment of
arbitrators by Com-
panies.

(Note).

Corresponding English Law.

This section corresponds to S. 7, Railway Companies Arbitration Act, 1859. Y

102. Where there are to be two or more arbitrators, if any of the Companies fail to appoint an arbitrator within fourteen days after being thereunto requested in writing by the other Company, or by the other Companies or any of them, then, on the application of the Companies or any of them, the Local Government, instead of the Company so failing to appoint an arbitrator, may appoint an arbitrator. The arbitrator so appointed shall for the purposes of this Act be deemed to be appointed by the Company so failing.

Appointment of arbitrators by Local Government.

(Note).

Corresponding English Law.

This section corresponds to S. 8, Railway Companies Arbitration Act, 1859. Z

103. Where the reference is made to two or more arbitrators, if before the matters referred to them are determined any arbitrator dies, or becomes incapable or unfit, or for seven consecutive days fails to act as arbitrator, the Company by which he was appointed shall by writing under their common seal appoint an arbitrator in his place.

Appointment of arbitrators by companies to supply vacancies.

(Note).

Corresponding English Law.

This section corresponds to S. 9, Railway Companies Arbitration Act, 1859. A

104. Where the Company, by which an arbitrator ought to be appointed in the place of the arbitrator so deceased, incapable, unfit, or failing to act, fails to make the appointment within fourteen days after being thereunto requested in writing by the other Company, or by the other Companies or any of them, then, on the application of the Companies or any of them, the Local Government may appoint an arbitrator.

Appointment of arbitrators by Local Government to supply vacancies.

The arbitrator so appointed shall for the purposes of this Act be deemed to be appointed by the Company so failing.

(Note).

Corresponding English Law.

This section corresponds to S. 10, Railway Companies Arbitration Act, 1859. B

105. When any appointment of an arbitrator is made, the Company making the appointment shall have no power to revoke the same without the previous consent in writing of the other Company or every other Company in writing under their common seal.

Appointment of arbitrator not revocable.

(Note).

Corresponding English Law.

This section corresponds to S. 11, Railway Companies Arbitration Act, 1859. C

106. Where two or more arbitrators are appointed they shall, before entering on the business of the reference, appoint by writing under their hands an impartial and qualified person to be their umpire.

Appointment of umpire by arbitrators.

(Note).

Corresponding English Law.

This section corresponds to S. 12, Railway Companies Arbitration Act, 1859. D

107. If the arbitrators do not appoint an umpire within seven days after the reference is made to the arbitrators, then, on the application of the Companies or any of them, the Local Government may appoint an umpire; and the umpire so appointed shall for the purposes of this Act be deemed to be appointed by the arbitrators.

Appointment of umpire by Local Government.

(Note).

Corresponding English Law.

This section corresponds to S. 13, Railway Companies Arbitration Act, 1859. E

108. Where two or more arbitrators are appointed, if before the matters referred to them are determined their umpire dies, or becomes incapable or unfit, or for seven consecutive days fails to act as umpire, the arbitrators shall by writing under their hands appoint an impartial and qualified person to be their umpire in his place.

Appointment of umpire by arbitrators to supply vacancy.

(Note).

Corresponding English Law.

This section corresponds to S. 14, Railway Companies Arbitration Act, 1859. F

109. If the arbitrators fail to appoint an umpire within seven days after notice in writing to them of the decease, incapacity, unfitness, or failure to act of their umpire, then, on the application of the Companies or any of them, the Local Government may appoint an umpire.

Appointment of umpire by Local Government to supply vacancy.

The umpire so appointed shall for the purposes of this Act be deemed to be appointed by the arbitrators so failing.

(Note).

Corresponding English Law.

This section corresponds to S. 15, Railway Companies Arbitration Act, 1859. G

110. Every arbitrator appointed in the place of a preceding arbitrator, and every umpire appointed in the place of a preceding umpire, shall respectively have the like powers and authorities as his respective predecessor.

Succeeding arbitrators and umpires to have powers of predecessors.

(Note).

Corresponding English Law.

This section corresponds to S. 16, Railway Companies Arbitration Act, 1859. H

111. Where there are two or more arbitrators, if they do not within such a time as the Companies agree on, or, failing such agreement, within thirty days next after the reference is made to the arbitrators, agree on their award thereon, then the matters referred to them, or such of those matters as are not then determined, shall stand referred to their umpire.

Reference to umpire.

(Note).

Corresponding English Law.

This section corresponds to S. 17, Railway Companies Arbitration Act, 1859. I

112. The arbitrator, and the arbitrators and the umpire, respectively, may call for the production of any documents or evidence in the possession or power of the Companies respectively, or which they respectively can produce; and which the arbitrator, or the arbitrators of the umpire shall think necessary for determining the matters referred, and may examine the witnesses of the Companies respectively on oath.

Power for arbitrators, etc., to call for books, etc., and examine witnesses on oath.

(Note).

Corresponding English Law.

This section corresponds to S. 18, Railway Companies Arbitration Act, 1859. J

113. Except where and as the Companies otherwise agree, the arbitrator, and the arbitrators and the umpire, respectively, may proceed in the business of the reference in such manner as he and they respectively shall think fit.

Procedure in the arbitration.

(Note).

Corresponding English Law.

This section corresponds to S. 19, Railway Companies Arbitration Act, 1859. **K**

114. The arbitrator, and the arbitrators and the umpire, respectively, may proceed in the absence of all or any of the Companies in every case in which, after giving notice in that behalf to the Companies respectively, the arbitrator, or the arbitrators or the umpire, shall think fit so to proceed.

Arbitration may proceed in absence of Companies.

(Note).

Corresponding English Law.

This section corresponds to S. 20, Railway Companies Arbitration Act, 1859. **L**

115. The arbitrator, and the arbitrators and the umpire, respectively, may, if he and they respectively think fit, make several awards, each on part of the matters referred, instead of one award on all the matters referred.

Several awards may be made.

Every such award on part of the matters shall, for such time as shall be stated in the award, the same being such as shall have been specified in the agreement for arbitration, or, in the event of no time having been so specified, for any time which the arbitrator may be legally entitled to fix, be binding as to all the matters to which it extends, and as if the matters awarded on were all the matters referred, and that notwithstanding the other matters or any of them be not then or thereafter awarded on.

(Note).

Corresponding English Law.

This section corresponds to S. 21, Railway Companies Arbitration Act, 1859. **M**

116. The award of the arbitrator, or of the arbitrators or of the umpire, if made in writing under his or their respective hand or hands, and ready to be delivered to the Companies within such a time as the Companies agree on, or, failing such agreement, within thirty days next after the matters in difference are referred to (as the case may be) the arbitrator, or the arbitrators or the umpire, shall be binding and conclusive on all the Companies.

Awards made in due time to bind all parties.

(Note).

Corresponding English Law.

This section corresponds to S. 22, Railway Companies Arbitration Act, 1859. **N**

117. Provided always that (except where and as the Companies otherwise agree) the umpire, from time to time by writing under his hand, may extend the period within which his award is to be made. If it be made and ready to be delivered within the extended time, it shall be as valid and effectual as if made within the prescribed period.

Power for umpire to extend period for making his award.

(Note).

Corresponding English Law.

This section corresponds to S. 23, Railway Companies Arbitration Act, 1859. O

118. No award made on any arbitration in accordance with this Act shall be set aside for any irregularity or informality.

Awards not to be set aside for informality.

(Note).

Corresponding English Law.

This section corresponds to S. 24, Railway Companies Arbitration Act, 1859. P

119. Except only so far as the Companies bound by any award in accordance with this Act from time to time otherwise agree, all things by every award in accordance with this Act lawfully required to be done, omitted or suffered shall be done, omitted or suffered accordingly.

Awards to be obeyed.

(Note).

Corresponding English Law.

This section corresponds to S. 25, Railway Companies Arbitration Act, 1859. Q

120. Full effect shall be given by the Courts according to their respective jurisdictions, and by the Companies respectively and otherwise, to all agreements, references, arbitrations and awards in accordance with this Act; and the performance or observance thereof may, where the Courts think fit, be compelled by any process against the Companies respectively or their respective property that the Courts or any Judge thereof shall direct, and where requisite frame, for the purpose.

Agreements, arbitrations and awards to have effect.

(Note).

Corresponding English Law.

This section corresponds to S. 26, Railway Companies Arbitration Act, 1859. R

121. Except where and as the Companies otherwise agree, the costs of and attending the arbitration and the award shall be in the discretion of the arbitrator, and the arbitrators and the umpire, respectively.

Costs of arbitration and award.

(Note).

Corresponding English Law.

This section corresponds to S. 27, Railway Companies Arbitration Act, 1859. S

122. Except where and as the Companies otherwise agree, and if and so far as the award does not otherwise determine, the costs of and attending the arbitration and the award shall be borne and paid by the Companies in equal shares, and in other respects the Companies shall bear their own respective costs.

(Note).

Corresponding English Law.

This section corresponds to S. 28, Railway Companies Arbitration Act, 1859. T

123. On the application of any party interested, the submission to any such arbitration may be filed in the High Court, and an order of reference may be made thereon, with any directions the Court thinks fit; and the provisions of the Code of Civil Procedure shall, so far as the same are applicable, apply to every such order and to all proceedings thereunder.

(Note).

Corresponding English Law.

This section corresponds to S. 29, Railway Companies Arbitration Act, 1859. U

PART IV.

WINDING-UP OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT 1.

: Preliminary.

124. The term "contributory" shall mean every person liable to contribute to the assets of a Company under this Act in the event of the same being wound up²; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory³.

(Notes).

1.—"Winding-up....this Act."

(1) Modes of winding-up.

A company may be wound up in one of the three following ways:—

- (i) by the Court, or (ii) voluntarily, or (iii) subject to the supervision of the Court.

N.B.—A voluntary winding-up of a Company is no bar to a winding-up by Court. The Court may on the petition of a creditor of the Company order a winding-up, if it is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up. See 189, *infra*.

1.—“Winding-up...this Act”—(Continued).

(2) Incorporated Company—How extinguished.

An incorporated Company cannot come to an end except by means of a winding-up. See *Princess of Reuss v. Bos*, L.R. 5 H.L. 176. Y

(3) Corporation cannot be made bankrupt.

No insolvency petition shall be presented against any Corporation or against any association or Company registered under any enactment for the time being in force. See S. 107, Presidency Towns Insolvency Act (III of 1909). W

WHAT COMPANIES MAY BE WOUND-UP.

(1) Registered Companies.

(a) (i) Companies registered under this Act, including those registered under part VII, *infra*. See S. 240, *infra*. X

(ii) Companies formed and registered under Act XIX of 1857 and Act VII 1860 or either of them. (S. 221, *infra*). Y

(iii) Companies registered but not formed under the said Acts or either of them. (S. 222.) Z

(b) Companies registered under the earlier Acts may, without being registered under this Act, be wound-up compulsorily or voluntarily or subject to the supervision of the Court like Companies registered under this Act. Ss. 221 and 222. See, also, *London India Rubber Co.*, 1 Ch. 329. A

(c) A Company duly registered, though formed for an illegal object, can be wound-up. *Re Padstow Total Loss Assn per Brett*, L.J. 2 C.D. at p. 147; *Cf. Thwaites v. Coulthwaite*, (1896) 1 Ch. 496. B

(d) So also can a partnership illegally registered under part VII, *infra*. *Re Newman*, (1895) 1 Ch. 685. C

(e) A registered Company whose articles provide for the transfer of its shares by delivery, may be wound up. Such a Company is not illegal though the provision as to the transfer of shares by delivery is illegal. *General Co. for Promotion of Land Credit*, 5 Ch. 363; affirmed H.L. *Sub nom Reuss v. Bos*, L.R. 5 H.L. 176; *Littlehampton Steamship Co.*, 34 Beav. 256=2 D.J. and S. 521. D

Quere :—Whether a Company though registered can be wound-up, if its memorandum is signed by less than seven persons. See *National Debenture Corp.*, (1891) 2 Ch. 505, *distinguishing Oakes v. Turquand*. L.R. 2 H.L. 354. E

N.B.—Under the present English Law, however, such a Company may be wound-up. For, under S. 17 of the English Companies (Consolidation) Act of 1908, the certificate of incorporation is conclusive evidence that all the requirements of the Act not only in respect of registration but also in respect of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Act. But see the corresponding section of the Indian Act, S. 41, *supra*. F

(2) Unregistered Companies.

Unregistered Companies coming under S. 243, *infra*, may be wound up.

I.—“Winding-up....this Act”—(Concluded).

But, such Companies, cannot be wound-up voluntarily or subject to the supervision of the Court. They can be wound up only by an order of the Court or in an action. See S. 243 (2), *infra*; also *Re Lead Company's Workman's Funds Society*, (1904) 2 Ch. 196. **G**

N.B.—The expression “more than seven members” in S. 243, means *more than seven members at the date of the petition*. *Bolton Benefit Loan Society*, 12 C.D. 679; see, also, *Re Bowling and Welby*, (1895) 1 Ch. 663.

N.B.—If the members are less than seven the Company can be wound up only in an action. *Bolton Benefit Loan Society*, 12 C.D. 679.

(3) Foreign Companies.

(a) A foreign Company may be wound up in this country, provided it has a branch or office, assets and creditors here. The fact that all the operations of the Company are outside this country is no bar to the jurisdiction to wind-up. *Commercial Bank*, 6 Eq. 517; *Mathesore Brothers Limited*, 27 Ch.D. 225; *Commercial Bank of South Australia*, 33 C.D. 174; *Federal Bank of South Australia*, 62 L.J. Ch. 561; *Queensland National Bank* (1883) W.N. 128; *Mercantile Bank of Australia*, (1892) 2 Ch. 204; *Madrid and Valentia Railway Co.*, 3 D.D. and Sm. 127=2 Mac. and G. 169; *Javis Couklyn Mortgage Co.*, 11 T.L.R. 373; *Re Faccage Parisien* 34 L.J. (Ch.) 140=13 W.R. 214, 330=L.T. 500, 556=11 Jur. N.S. 121; *Peruvian Railways Co.*, 2 Ch. 617; *Tumacacori Mining Co.*, 17 Eq. 534. **H**

(b) Nor is the Court's jurisdiction affected by the existence of a winding-up order made by a foreign Court whether such order was made before or after the presentation of the petition in this country. *Matheson Brothers Limited*, 27 Ch. D. 225, *Commercial Bank of South Australia*, 33 C. D. 174. **I**

(c) But the winding-up in this country should be only ancillary to that in the country of the Company's domicile. *Commercial Bank of South Australia*, 33 C.D. 174. **J**

(d) In the matter of winding a foreign Company, the Court exercises a judicial discretion, and will not make an order, unless it is shown that there exist in this country means of doing substantial justice. *Union Bank of Calcutta*, 3 De. G. and Sm. 253. **K**

2.—“The term ‘contributory’....wound-up.”

(1) Corresponding English Law.

This section corresponds to S. 124 of the English Companies (Consolidation), Act of 1908.

N.B.—The section must be read with S. 61, *supra*, which describes the persons who are liable to contribute to the assets of a Company in the event of its being wound-up. See *Anglesea Colliery Company*, 1 Ch. 555, 559; *National Savings Bank Association*, 1 Ch. 547, 551. **L**

(2) Fully paid share-holders—Whether contributories.

(a) Though the holder of fully paid shares in a limited Company, is not liable for calls, he is a contributory, and is entitled to be placed on the list of contributories, in order to share the surplus assets, if any. *Anglesea Colliery Co.*, 1 Ch. 555=2 Eq. 379; *Hodges' Distillery Co.*, E.P. Maude, 6 Ch. 51. **M**

2.—“The term ‘contributory’....wound-up” —(Concluded).

- (b) But, he cannot be placed on the list without his consent even though he is indebted to the Company. The Court cannot place him on the list merely to enforce the payment of his debt under S. 150, *infra*. If he does not like to be placed on the list, the debt can be recovered only in an action. *Marlborough Club Co.*, 5 Eq. 365; *Leischild's case*, 1 Eq. 231; *Hodges' Distillery Co.*, E.P. Maude, 6 Ch. 51. N
- (c) A fully paid share-holder may present a petition for winding-up. *National Savings Bank Association*, 1 Ch. 547. O

(3) Scrip-holder.

- (a) The holder of a scrip certificate who is entitled to become a share-holder in respect of the shares therein mentioned, and in the meantime to receive dividends is a contributory, if he admits himself to be a contributory, and undertakes to do all acts necessary to become a share-holder. *Littlehampton Steamship Co.*, 2 D. J. and S. 571; *Ex. P. Capper* 3 De. G. and S. 1; *Wexford, etc. Ry. Co.*, 3 De. G. and S. 116. P

Quere.—Whether the scrip-holder would be a contributory if he does not admit himself to be a contributory. (*Ibid.*) Q

- (b) A person who applied for 100 shares but who was allotted only 10 shares and was given a scrip certificate for 90 shares was held to be a contributory only in respect of 10 shares. *Ormerod's case*, 5 Eq. 110, *cited* in *Buckley*, 9th Ed., p. 292. R

(4) Past members.

The Court may pass a winding-up order on the petition of persons who have transferred their shares and who allege themselves to be contributories, though as between themselves and other proprietors they are under the terms of a deed of settlement discharged from liability. *Time Fire Co.*, 3 Beav. 596. S

N.B.—Such members are contributories, for, their liability is not discharged as against creditors. *Buckley*, 9th Ed., p. 291.

3.—“It shall also....alleged to be a contributory.”

Winding-up petition by alleged contributory.

The Court will not generally entertain an application for, winding-up, by an alleged contributory unless he will admit himself to be a contributory. *Re Continental Bank Corporation Re London and Madiferrnean Bank*, 15 W.R. 548 = 16 L.T. 112 = (1867), W.N. 114, 178. T

125. The liability of any person to contribute to the assets of a

Nature of liability of contributory.

Company under this Act in the event of the same being wound up shall be deemed to create a debt¹ accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability, and it shall be lawful, in the case of the insolvency of any contributory, to prove against his estate the estimated value of his liability to future calls, as well as calls already made².

No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes situate outside the towns of Calcutta, Madras, and Bombay.

(Notes).

General.

Corresponding English Law.

The first para of this section corresponds to Ss. 125 and 127 (2) of the English Companies (Consolidation) Act of 1908. **U**

S. 125 of the English Act contains the words "in England and Ireland of the nature of special duty" between the words "debt" and "accruing due."

1.—"The liability....a debt."

(1) Contributories' liability binds the heirs.

(a) The liability to contribute in a winding-up binds the heirs as much as the liability to pay calls made by the directors of a going Company. The same legal obligation binds both members and contributories. *Buck v. Robson*, 10 Eq. 629. See, also, Ss. 11 and 39, *supra*, and S. 126, *infra*. **Y**

(b) The provisions of this section are applicable to the winding-up of an unregistered Company under Part VIII, *infra*, and the liquidator of such a Company is entitled to prove against the estate of a deceased contributory for the estimated value of future calls though no call has been made in the winding-up, and to have a proportionate share of the fund meet such claims. *In re Muggeridge Muggeridge, v. Sharpe*, 10 Eq. 443. **W**

(2) Contributory's liability—When commences.

The liability under the section commences on the date when the contributory entered into the contract under which he became a member. *Ex. P. Canwell*, 4 De.G.J. and S. 539=33 L.J. (Bk.) 26; *Ex. P. Mackenzie*, 7 Eq. 240; *Williams v. Harding*, L.R. 1 H.L. 929; *Faure Electric Accumulator Co. v. Phillipart*, 58 L.T. 525; *Ex. P. Hatcher*, 12 C.D. 284; *Buck v. Robson*, 10 Eq. 629; *Whitehouse & Co.*, 9 C.D. 595. **X**

(3) Liability, contingent until call is made.

(a) Though the liability of a contributory creates a debt even before a call is made, it is a debt which does not accrue due until a call is made. Till then the liability is only contingent. See *E.P. Canwell*, 4 D.J. and S. 539=33 L.J. (Bk.) 26; *Williams v. Harding*, L.R. 1 H.L. 9 (29); *West of England Bank, E.P. Hatcher*, 12 Ch. D. 284. *In re Muggeridge Muggeridge v. Sharpe*, 10 Eq. 443. **Y**

(b) Hence, the Company cannot claim to set off a debt due by it to a member against the liability of that member in respect of future calls. *Grisse's case*, 1 Ch. 528. See, also, *Ex. P. Brown*, 12 C.D. 823. **Z**

(4) Call when due.

A call is owing from the day on which it is made although it is payable on a subsequent day. *Re China Steamship Co., Daves' case*, (1869) 38 L.J. Ch. 512. **A**

(5) Interest on calls.

The Court may allow interest on calls in a winding-up. But, the provisions in the articles as to interest on calls do not necessarily apply to calls in winding-up. See *Welsh Flannel Co.*, 20 Eq. 360. **B**

2.—“ *It shall be lawful....already made.*”

(1) Insolvency of contributory.

This section and S. 127, *infra*, relate to cases where a contributory becomes an insolvent, i.e., to cases where a member becomes an insolvent after the commencement of winding-up, and not to cases where insolvency precedes winding-up. *Financial Corp v. Lawrence*, L.R. 4 C. P. 730 ; *Hastie's case*, 7 Eq. 3=4 Ch. 274. C

(2) Insolvency of member before winding-up.

(a) If a share-holder becomes an insolvent before winding-up, the Official Assignee may disclaim the shares ; such disclaimer operates to determine the rights and liabilities of the insolvent in respect of the shares ; the Company shall thereupon be deemed to be a creditor of the insolvent to the amount of the injury caused by disclaimer, and may prove the same as a debt under the insolvency. See Ss. 62 and 66, Presidency Towns Insolvency Act (III of 1909). See, also, *Re Hallett*, (1894) W.N. 156. D

(b) If the Company is subsequently wound up, neither the insolvent nor the Official Assignee can be placed on the A list or B list of contributories. *Ex. P. Budden and Roberts*, 12 C. D. 288. See, also, *Emden's Winding-up of Companies*, 8th Ed., p. 206. E

(c) If the Assignee do not disclaim, the Company can prove for calls made as also for the estimated value of future calls. *Re West Coast Gold Fields*, (1906) 1 Ch. 1. F

(d) On payment of dividends the shares do not become full paid, for the purpose of the distribution of surplus assets of the Company. *Re West Coast Gold Fields*, (1906) 1 Ch. 1.

N.B.—As to debts provable in insolvency which include contingent liabilities. See S. 46 of the Presidency Insolvency Act (III of 1909).

N.B.—When a contributory becomes an insolvent, he becomes an utter stranger to the Company, and no order in the winding-up proceedings can be made on his application. G

(3) Insolvency after winding up.

(a) If a share-holder becomes an insolvent after winding-up, the Assignee can disclaim, in which case the liquidator may prove for the injury. *Re Hallett*, (1894) W.N. 156 ; *Mitchell's case*, 5 Ch. 400. H

(b) If the Official Assignee do not disclaim, the liquidator can prove for all calls made as well as for the estimated value of future calls. (*Ibid.*)

N.B.—The name of a contributory is not removed from the list, though he may become an insolvent. *Re Cape Breton Co.*, 19 C.D. 77. I

(c) If the Company having the right of proof neglects to avail itself of the right, and the insolvent is discharged, he cannot afterwards be placed in the list. *Mercantile Mutual Marine Association*, 25 C.D. 415 and other cases, cited in *Emden's Winding-up of Companies*, 8th Ed., p. 207. J

(d) In the same way, a transferor who neglects to prove the right, of indemnity may lose it, by the discharge of the bankrupt. *Hardy v. Fothergill*, 18 A.C. 351. K

126. If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in due course of administration to contribute to the assets of the Company in discharge of the liability of such deceased contributory¹; and such personal representatives, heirs and devisees shall be deemed to be contributories accordingly.

Contributories in case of death.

(Notes).

(General.

Corresponding English Law.

This section corresponds sub-sec. 1 of S. 126 of the English Companies (Consolidation) Act of 1908, which contains two more sub-sections which run thus :—(2) Where the personal representatives are placed on the list of contributories the heirs or devisees need not be added, but, except in the case of heirs or devisees of any such real estate in England, they may be added as and when the Court thinks fit. If the personal representatives make default in paying any money ordered to be paid by them, proceedings may be taken for administering the personal and real estates of the deceased contributory or either of them and of compelling payment thereof of the money due. **L**

I.—“His personal representatives....contributory.”

(1) Deceased member's estate—Liability for calls.

- (a) The estate of a deceased share-holder is liable to the same extent as he himself would have been. His death in no way alters the liability for calls, nor disentitles the estate for dividends payable on the shares. *Baird's case*, 5 Ch. 725. **M**
- (b) A deceased member remains a member so long as his name remains on the register without notice to the company of his death. *New Zealand Co. v. Peacock*, (1894) 1 Q.B. 622. **N**
- (c) The liability can, so long as the shares are standing in the name of the deceased member or his representative, in his representative capacity, be enforced against his moveable property and immoveable property in the hands of devisee. *Turquand v. Kirby*, 4 Eq. 123; *Hamer's case*, 2 D.M. and G. 366. **O**
- (d) Whether the share-holder die after the commencement of winding-up, and before or after he has been placed on the list of contributories, or whether he have died many years before the winding-up, but his shares have not been either personally accepted or otherwise disposed of by his executors, the liability of his estate is the same, and is that which would have been the liability of the share-holder if living. *Buckley*, 9th Ed., p. 294.

N.B.—But neither a deceased share-holder nor his personal representative will count as a member for purposes of determining the number of members. *New Zealand Co. v. Peacock*, (1894) 1 Q.B. 622. **P**

1.—“His personal representatives....contributory”—(Continued).

N.B.—Thus, if for winding-up an unregistered Company under S. 243 it becomes necessary to determine whether it consists of more than seven members, neither the estate of a deceased member nor his personal representative will be regarded as a member. *New Zealand Co. v. Peacock*, (1894) 1 Q.B. 622.

(e) Under S. 144 (9), the Official Liquidator can take out, if necessary, in his official name, letters of administration to the estate of a deceased contributory. P-1

(f) Though the liability of a share-holder's estate, is, under the Act only a contingent liability, the liquidator may claim to have a sum set apart to answer future calls. *In re Muggeridge, Muggeridge v. Sharp*, 10 Eq. 443. Q

(2) Liability as between the estate and a legatee.

In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock Company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment shall, as between the testator's estate and the legatee, be borne by such estate; but if any call or other payment shall, after the testator's death, become due in respect of such stock, the same shall, as between the testator's estate and the legatee, be borne by bequest. S. 157, Indian Succession Act (X of 1865). R

(3) Liability of personal representatives.

(a) The personal representatives of a deceased share-holder are not, so long as they have not personally accepted, transferred or disposed of the shares, personally liable for calls, but they are liable only in their representative capacity. See *New Zealand Co. v. Peacock* (1894), 1 Q.B. 622; *Buchan's case*, 4 A.C. 549; *Taylor v. Taylor*, 10 Eq. 477. S

(b) An executor is not liable for a *devastavit* for paying debts, before a call is made or before claim is made by the liquidator for the amount of the estimated liability in respect of future calls. See *Lady Rolt's case*, (Eur. Arb.) L.T. 106. T

(c) A balance order against the legal personal representatives is not such a judgment as would give the liquidator priority over the other creditors. *International Marine Co. v. Hawes*, 29 Ch. Div. 934. U

(d) But if an executor proceeds to distribute the estate among the beneficiaries, without providing for liability on shares held by the deceased in the Company, he may become personally liable. *Taylor v. Taylor*, 10 Eq. 477. V

N.B.—An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death. S. 117, Probate and Administration Act (V of 1881) and S. 297, Indian Succession Act (X of 1865).

N.B.—Nor is he bound to pay any legacy without a sufficient indemnity to meet contingent liabilities whenever they may become due. S. 286, Indian Succession Act (X of 1865).

(4) Executor's right to indemnity on payment of calls.

(a) If, an executor has paid bequests without providing for payment of future calls, and has in consequence been obliged to pay for calls out of his

1.—“His personal representatives....contributory”—(Concluded).

own money he is entitled to indemnity, and can call upon the legatees to refund the sums paid by him. *Jervis v. Wolferston*, 18 Eq. 18; *Whittaker v. Kershaw*, 14 C.D. 320. W

(b) When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion. S. 138, Probate and Administration Act (V of 1881), and S. 319, Indian Succession Act (X of 1865). X

(c) Where shares specifically bequeathed, have been transferred under the order of the Court in an administration suit, the executor is not entitled to any indemnity against liability in respect of those shares. The order of the Court is itself a sufficient indemnity to him. *Addams v. Ferick*, 26 Beav. 384; *Re King*, (1907) 1 Ch. 72; *Re Nixon*, (1904) 1 Ch. 638. Y

(5) Death of a joint shareholder—Survivorship.

Two or more persons registered as joint share-holders are joint tenants so far as the legal interest is concerned. In the absence of anything to the contrary in the articles, the covenant into which they are, by virtue of S. 41, to be deemed to have entered will be taken to be a joint, and not a joint and several covenant. Upon the death of one, his liability will cease. See *Hill's case*, 20 Eq. 585; also Buckley, 9th Ed., p. 295. Z

127. If any contributory becomes insolvent, either before or

Contributories in
case of insolvency.

after he has been placed on the list of contributories, his assignees shall be deemed to represent such insolvent for all the purposes of the winding-up, and shall be deemed to be contributories ¹ accordingly, and may be called upon to admit to proof against the estate of such insolvent, or otherwise to allow, to be paid out of his assets in due course of law, any moneys due from such insolvent in respect of his liability to contribute to the assets of the Company being wound up.

(Notes).

General.

Corresponding English Law.

This section corresponds to sub-sec. 1 of S. 127 of the English Companies (Consolidation) Act of 1908. A

1.—“His assignees....contributories.”**Insolvent—Contributory, a stranger to the Company.**

Where a contributory becomes insolvent his name is not removed from the list. But his assignee represents him for all purposes, and is to be deemed a contributory; the insolvent becomes a stranger to the Company, and the Court cannot entertain an application by him in the winding-up. *Cape Breton Co.*, 19 Ch. Div. 77. B

Winding-up by Court.

Circumstances
under which Com-
pany may be wound
up by Court.

128. A Company under this Act may be wound up by the Court as hereinafter defined under the following circumstances (that is to say) :—

- (a) whenever the Company has passed a special resolution requiring the Company to be wound up by the Court¹;
- (b) whenever the Company does not commence its business within a year from its incorporation or suspends its business for the space of a whole year²;
- (c) whenever the members are reduced in number to less than seven³;
- (d) whenever the Company is unable to pay its debts;
- (e) whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the Company should be wound up⁴.

(Notes).
General.

Corresponding English Law.

This section corresponds to S. 129 of the English Companies (Consolidation) Act of 1909. But the Indian Act does not contain any provision similar to cl. (ii) of the section of the English Act which says that a Company may be wound up by the Court if default is made in filing the statutory report or in holding the statutory meeting." Again, cl. (vi) of the section of the English Act which corresponds to cl. (e) of the present section does not contain the words "for any other reason of a like nature." C

*1.—"Whenever....wound up by the Court."***Winding-up in pursuance of a special resolution.**

A Company may be wound up for any cause whatever if a sufficient number of members pass a special resolution that it shall be wound up. Topham, 2nd Ed., p. 208. D

*2.—"Whenever....a whole year."***(1) Order under cl. (b) when may be passed.**

- (a) The power of the Court to wind up a Company on the ground that it has not commenced business within a year from its incorporation or has suspended its business for the space of a whole year, is discretionary, and will not be exercised unless there is a fair indication that there is no intention of carrying on or continuing the business. See *Metropolitan Railway Warehousing Co.*, 15 W.R. 1121=17 L.T. 108. See, also, Buckley, 9th Ed., p. 308; Topham, 2nd Ed., p. 208. E

- (b) The Court will refuse to make an order if satisfactory reasons are given for the delay or suspension, and there is a *bona fide* intention to carry on the business. *Metropolitan Railway Warehousing Co.*, 15 W. R. 1121=17 L.T. 108; *Re Capital Fire Insurance* (1882) 21 Ch. D. 209; *Middlesborough Assembly Rooms Co.*, 14 Ch. Div. 104; *Petersburg Gas Co.*, (1894) W.N. 196. F

2.—“Whenever....a whole year”—(Continued).

(c) Thus, an order was refused in the case of a Company which was formed to carry on business in England and France, where it appeared that the Company had actually commenced a considerable business in France within the year and intended to commence business in England as soon as sufficient capital should be subscribed. *Re Capital Insurance*, (1882) 21 Ch. D. 209.

N.B.—A Company formed to carry on business, e.g., to work a tramway, in a foreign country cannot be deemed not to be carrying on business simply because it is not working a tramway in this country. See *Per Chitty, J.* in *Capital Fire Insurance Assurance*, 21 C.D. 209. **G**

(d) But, an order will be made if the Court is satisfied that the business has never been and will never be commenced, though the Company has received no money and has no debts. *Tumacacori Mining Co.*, 17 Eq. 534; *Caementium Co.*, (1908) W.N. 257. **H**

(e) If the majority of share-holders unreasonably refuse to pass resolutions for the voluntary winding-up of a Company that has never and will never carry on business, the Court will order a winding-up, on the petition of a share-holder. *Tumacacori Mining Co.*, 17 Eq. 534; *Caementium Co.*, (1908) W.N. 257.

N.B.—(i) But, in *New Gas Generator Co.*, 4 Ch. D. 874, Bacon, V. C. refused to follow the authority of *Tumacacori Co.*, 17 Eq. 534, and declined to make an order on the petition presented by the legal personal representative of a deceased subscriber of the memorandum, on the ground that no debt was shown to exist.

N.B.—(ii) The fact that an incorporated Company cannot be extinguished except by means of a winding-up, should be borne in mind in considering a share-holder's right to an order. See *Princess of Reus v. Bos*, L.R. 5 H.L. 176. See Buckley, 9th Ed., p. (2) **I**

(2) Abandonment of business—Test of.

In cases under this head the question is whether the Company has abandoned the purpose for which it was formed, and the Court must see whether the Company is in any way carrying into effect the objects stated in the memorandum, and be satisfied that there is an intention to abandon the business, or inability to carry it on. *Tomlin Patent Horse Shoe Co.*, 55 L.T. 314, cited in *Emden's Winding up of Companies*, 8th Ed., p. 19. **J**

(3) Order before expiration of one year—When justified.

(a) A winding-up order may be passed even before the expiration of the year of the case comes under any other clause of the section. See *London and County Coal Co.*, 3 Eq. 355; *Langham Skating Rink Co.*, 5 Ch. D. 669; *German Date Coffee Co.*, 20 Ch. Div. 169. **K**

(b) But the Court will not in the absence of exceptional grounds interfere before the year has expired. *Hop and Malt Exchange Co.*, (1866) W. N. 222; *Langham Skating Rink Co.*, 5 Ch. Div. 669. **L**

(4) Abandonment of one of several businesses.

A Company formed to carry on several businesses will not be wound up if it ceases to carry on one of such businesses, unless the business abandoned is the main object of the Company. See *Norwegian Titanic Iron Co.*, 35 Beav. 223; *Per M.R.*; *Re* (1900), 2 Ch. 654; *Patent Bread, etc. Co.*,

2.—“Whenever....a whole year”—(Concluded).

14 L.T. 582=14 W.R. 787; *Langham Skating Rink Co.*, 5 Ch. Div. 669; *New Gas Co.*, 36 L.T. 364=37 L.T. 111=5 Ch. Div. 703. See, also, *Thellusson v. Valentia*, (1907) 2 Ch. 1. M

(5) Amalgamation whether a ground for winding up.

A Company cannot be wound up by the Court on the ground that it has amalgamated with another Company and ceased to carry on business separately. *National Financial Corporation*, (1866) W.N. 243=14 W. R. 907=14 L.T. 749. See, also, *Anglo Australian, etc. Life Assurance Co.*, 1 Dr. and Sm. 113. N

3.—“Whenever....to less than seven.”

N.B.—There is no reported case in which a winding-up has been ordered simply on the ground that the members are reduced to less than seven. See *Emden's Winding up of Companies*, 8th Ed., p. 20. N-1

(1) Company with a few members—Winding-up of.

- (a) A Company with a small number of share-holders may be ordered to be wound up. *West Surrey Tanning Co.*, 2 Eq. 737; *London and County Coal Co.*, 3 Eq. 355; *Sanderson's Patents Association*, 12 Eq. 188; *Cf. Tumacacori Mining Co.*, 17 Eq. 534. O
- (b) “The section enables an order when the share-holders are less than seven, so that an order cannot be improper when the number is seven or more.” *Buckley*, 9th Ed., p. 304. P
- (c) But, the Court would not, in the absence of special circumstances, be inclined to apply the expensive machinery of a winding-up order to a Company with very few share-holders. The Court will leave it to the Company to wind up voluntarily. See *Natal, etc. Co.*, 1 H. & M. 639; *Sea and River Marine Insurance Co.*, 2 Eq. 545; *New Gas Generator*, 4 Ch. D. 874; *Secus Sanderson's Patents*, 12 Eq. 188. (Malins, V.C.). Q
- (d) A compulsory order in the case of a Company with a few members is justified only when there is a suspicion of fraud, which may be detected by a winding-up. *New Gas Generator Co.*, 4 Ch. D. 874. R
- (e) Thus, an order was refused where there were no debts, and only nine members, and no difficulty in the way of voluntary winding-up. *Natal, etc., Co.*, 1 H. & M. 639. S
- (f) So, also, in a case where there were no debts and there were only seven members. *Sea and Marine Insurance Co.*, 2 Eq. 545; *New Gas Generator*, 4 C.D. 874. T
- (g) Winding-up was ordered in the following cases:—
 - (1) Where there were ten share-holders, but there were matters requiring investigation and the preponderating influence of one share-holder. *West Surrey Tanning Co.*, 2 Eq. 737. U
 - (2) Where there were seven members and gross fraud disclosed. *London and County Coal Co.*, 3 Eq. 355. Y
 - (3) The existence of only seven or very few members was held no answer to a creditor's petition. *Lacey & Co.*, 46 L.J. Ch. 660; *Anglo Mexican Co.*, (1875) W.N. 168.

N.B.—Emden says “It may be doubted whether any difficulty would be raised now-a-days.” See *Emden's Winding up of Companies*, 8th Ed., p. 20; *Cf. Caementum Parent Co. Ltd.*, (1908) W.N. 257. W

4.—“Whenever....should be wound up.”

(1) Scope of clause (e)—English and Indian Law.

(a) (1) This clause corresponds to the fifth sub-clause of S. 79 of the English Companies Act, 1862. For many years it was considered that the sub-clause was restricted to matters *ejusdem generis* with the four previous sub-clauses of the same section corresponding to (a) to (d) of the present section. See *Suburban Hotel Co.*, 2 Ch. 737. W-1

(2) This old rule has of late been considerably relaxed, and the Courts in England have under the “just and equitable clause” unfettered discretion to consider any and all reasons which may be urged as making it just and equitable that the Company should be wound up. See *In re Amalgamated Syndicate*, (1897) 2 Ch. 600; for Vaughan Williams, J.; also, Palmer’s Company Law, 5th Ed., p. 334; *referred to* in 10 Bom. L.R. 107 (109, 110). X

(b) In India, it has been held that in spite of the words “for any other reason of a like nature” (which are not found in the corresponding section of the English Act) cl. (e) of the present section should be construed as widely as the corresponding provision of the English Act, and that the introduction of these words, is not intended to restrict the discretion of the Indian Courts to reasons *ejusdem generis* with the four previous clauses of the section. 10 Bom. L.R. 107 (111). Y

(c) But, though the Court has under this clause power to order a winding-up in cases not coming under any of the first four heads, the power should not be acted upon at the instance of a share-holder, unless a strong case is made. The Act creates as between the share-holders a domestic tribunal for the management of the affairs of the Company, and the Court should not, in the absence of some strong ground, withdraw from that tribunal the decision as to whether the Company’s business shall be carried on. See *In re Suburban Hotel Co.*, *per Jessell, M.R.* See, also, *In re Langham Skating Rink Co.*, (1877) 5 Ch. Div. 669. Cf. *Middlesborough Assembly Rooms Co.*, 14 Ch. Div. 104; *Gold Co.*, 11 Ch. Div. 701. But see *Amalgamated Syndicate*, (1897) 2 Ch. 600, *contra*. Z

(d) A part fulfilment of the conditions specified in each of the first four clauses would not justify the Court in passing an order for compulsorily winding-up a Company, in the absence of other circumstances bringing the case within cl. (e). 10 Bom. L.R. 107=32 B. 415. A

(e) When the law requires the fulfilment of one or more of several conditions before an order could be made, the part fulfilment of two or more of such conditions should not be taken as having cumulative effect justifying the order. 10 Bom. L.R. 107 (110). B

N.B.—Emden says, that it was stated many years ago that in a strong case an order would be made in cases not *ejusdem generis* (see *Suburban Hotel Co.*, 2 Ch. 737; *Langham Skating Rink Co.*, 5 C.D. 669), and though during recent years it has been held that the *ejusdem generis* rule has been relaxed, and even that the old cases may be ignored, still the recent cases might well be considered to fall within the rule, for, *Re Brinsmead & Sons*, (1897) 1 Ch. 406, was a case of gross fraud, not waived by the share-holders; *Re Amalgamated Syndicate*, (1897) 2 Ch. 600, was a case of the substratum having failed, and a business

4.—“Whenever....should be wound up”—(Continued).

entirely *ultra vires* being contemplated by the directors; and in *Re Sailing Ship Kentmere*, (1897 W.N. 59), owing to a complete deadlock in management, it had in fact become impossible to carry on business. See Emden's Winding up of Companies, 8th Ed., p. 27. C

CASES FALLING UNDER CLAUSE.

(1) Cases of preponderating influence of some members.

Cases in which, owing to the preponderating influence of one or more members who prevent a resolution being passed or insist on a voluntary liquidation, an investigation into their conduct becomes necessary. *Re Varieties, Ltd.*, (1893) 2 Ch. 235; *Gold Co.* 11 C.D. 701; *West Surrey Tanning Co.*, 2 Eq. 737; *South Luipards Vlei Gold Mines*, 13 T.L.R. 501, cited in Emden's Winding up of Companies, 8th Ed., p. 23. D

(2) Case of presentation of petition with a view to share surplus assets.

Cases in which a petition is presented by shareholders who seek the aid of the Court to work out the final disposition of surplus assets. *Anglo Mexican Co.*, (1875), W.N. 168, cited in Emden, 8th Ed., p. 23. E

(3) Case of *substratum* gone.

(a) Cases where the *substratum* of the Company has gone i.e., the business contemplated by the Company at the date of its formation has substantially become impossible, as where a Company established to work a gold mine has no title to the mine, or a Company formed for making coffee from dates under a German Patent has not acquired the Patent. *German Date Coffee Co.*, 20 C.D. 169; *Suburban Hotel Co.*, 2 Ch. 737; *Haven Gold Mining Co.*, 20 C.D. 151; *Coolgardie Consolidated Mines*, 41 Sol. J. 365; *International Cable Co.*, 2 Meg. 183; *Red Rock Mining Co.*, 61 L.T. 785; *Nylstroom Co.*, 60 L.T. 477; *McDonald Gold Mines*, 14 T.L.R. 204; *Amalgamated Syndicate* (1897), 12 Ch. 60. F

(b) It is not every object stated in the memorandum that forms its *substratum*; it is only on the failure of the principal or main object that the *substratum* is gone. See *Norwegian and Iron Co.*, 35 Beav. 223. F-1

(c) Where on the face of the memorandum there appears one main or principal object, any general words including other objects must be construed only as ancillary to the main object, so that if the main object fails, the *substratum* is gone though the other authorised object might be still carried out. *German Date Coffee Co.*, 20 C.D. 169; *Coolgardie Consolidated Mines*, 41 Sol. J. 365; *Re Amalgamated Syndicate*, (1897), 2 Ch. 600. G

(d) Where the business of a Company had been carried at a constant loss, and all the capital was spent, a winding up was ordered on a shareholder's petition on the ground that the business had come to an end without any prospect of resuscitation. *Diamond Fuel Co.*, 13 C. D. 400. See, also, *Great Northern Copper Co.*, 20 L.T. 264. H

(e) But, the clause does not authorize the Court to wind up a solvent Company against the wishes of the majority of shareholders merely because the business has been carried on at a loss, and appears likely to continue a losing concern. The winding up process cannot be used to evoke a judicial decision as to the probable success or failure of a Company.

4.—“Whenever....should be wound up”—(Continued).

See per Lord Cairns, *L.J.* in *Suburban Hotel Co.*, (1867), 2 Ch. 737 ; see, also, *Joint Stock Coal Co.*, 8 Eq. 46 ; *National Live Stock Insurance Co.*, 26 Beav. 153 ; *New Zealand Quartz Co.*, (1873) W.N. 174. I

- (f) A shareholder has no right to petition for winding up merely because the Company is proceeding to do something *ultra vires*. His remedy in such a case is to obtain an injunction on behalf of himself and other shareholders, to restrain the act alleged to be *ultra vires*. *Irrigation Co. of France*, Exp. Fore, 6 Ch. 176, 184 ; see, also, *Princess of Mashohaland*, (1893) 1 Ch. 731. J

- (g) But, if the directors are about to extend the business to *ultra vires* objects this may be cogent evidence that the real *substratum* of the Company has gone. See Buckley, 9th Ed., p. 306 F. N. (P.) ; see, also, *Amalgamated Syndicate*, (1897) 2 Ch. 600. K

- (h) If the legitimate object of the Company is entirely suspended the *substratum* is gone, and the *substratum* has not failed the less because an illegitimate business is being carried on. *Crown Bank*, 44 C. D. 634. L

(4) Bubble Companies.

Bubble companies, whose chief characteristic is that they have no *bona fide* intention to carry on business, come within this sub section. See *London and County Coal Co.*, 3 Eq. 355 ; *Anglo Greek Steam Co.*, 2 Eq. 1 ; *West Surrey Tanning Co.*, 2 Eq. 737 ; *Brinsmead & Sons* (1897), 1 Ch. at pp. 57 and 406. M

(5) Fraudulent Companies.

- (a) A fraudulent Company will be wound up unless the majority of the shareholders having full knowledge of the facts have waived the fraud. *Brinsmead & Sons*, (1897), 1 Ch. 45. See, also, *Haven Gold Mine*, 20 C.D. 151 ; re *Nylstroom Co.*, 60 L.T. 477. N

- (b) In *Brinsmead & Sons* (1897, 1 Ch. 45, 406) “a Company was initiated to carry out a fraud and was hopelessly embarrassed by actions brought by shareholders alleging fraudulent misrepresentation and there were strong suspicions that the promoters were organizing resistance to the petition in order to enable themselves to retain money to which the shareholders were entitled. The Court held it to be “just and equitable” to make a winding-up order. A meeting of the shareholders had voted in favour of continuing the business but false statements had been made at the meeting, and the vote did not in the opinion of the Court express the real preponderating wish of the majority.” Buckley, 9th Ed., p. 307. O

N.B.—But the Court will not make a compulsory order where the charge of fraud is not connected with the promotion or formation of the Company, but relates to dealings with the outside public, merely because an investigation under such an order would be desirable. *Medical Battery Co.*, (1894) 1 Ch. 444=63 L.J. Ch. 189=69 L.T. 799=42 W.R. 191 =8 R. 46=1 Mans. 104. P

(6) Insolvent Companies.

- (a) A Company though able to pay all its debts actually due may be wound up under this clause, if it is commercially insolvent that is, if the existing and probable assets would be insufficient to meet the existing liabilities. *European Life Assurance Society*, 9 Eq. 122, 128 ; *British Oil Co.*, 15 L.T. 601 ; Cf. *E. P. Lavton*, 1 K. and J. 204. Q

4.—“Whenever....should be wound up”—(Concluded).

- (b) Where the affairs of a Company are such that if it should continue to carry on business it must inevitably become insolvent at an early date, an order may be passed under this clause to enable a scheme of arrangement to be carried out. *Australian Joint Stock Bank*, (1897) W.N.48.T
- (c) If any portion of the share capital of a Company is incapable of being called up except in the event and for the purpose of winding up, such reserve capital shall be left out of account in determining the question of solvency. *Bristol Joint Stock Bank*, 44 C. D. 703. U

N.B.—A Company cannot be wound up on the ground of mismanagement or misconduct of directors, if it does not result in insolvency. *Anglo Greek Steamship Co.*, 2 Eq. 12; *Berlin Great Market Co.*, 19 W.R. 793. Y

Company when
deemed unable to
pay its debts.

129. A Company under this Act shall be deemed to be unable to pay its debts—

- (a) whenever a creditor, by assignment or otherwise, to whom the Company is indebted in a sum exceeding five hundred rupees then due ¹, has served on the Company, by leaving the same at its registered office, a demand ² under his hand requiring the Company to pay the sum so due, and the Company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor ³;
- (b) whenever execution or other process issued on a decree or order obtained in any Court in favour of any creditor in any proceeding instituted by such creditor against the Company is returned unsatisfied in whole or in part;
- (c) whenever it is proved to the satisfaction of the Court that the Company is unable to pay its debts ⁴.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 130 of the English Companies (Consolidation) Act of 1908. Under that section the petitioning creditor's debt should exceed £ 50. The concluding words of that section provide that in determining whether a Company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the Company.

But under the Indian Law except in the case of Life Assurance Companies, the expression “debts” when used with reference to winding-up proceedings, means only debts actually due, of which the creditor could claim immediate payment and does not include prospective and contingent liabilities. See S. 180, *para infra*, and notes under S. 181. W

1.—“A creditor....then due.”

(1) Equitable assignee of debt.

An equitable assignee of a debt is a creditor, entitled to present a winding-up petition. *Montgomery Ships Syndicate*, (1903) W.N. 121. X

N.B.—In order to present a petition as creditor a person must show that there is a debt, legal or equitable, which he can enforce against the Company. *Zoedone Co.*, 53 L.J. Ch. 465. Y

(2) Assignment by petitioning creditor—Right to proceed with petition.

A creditor cannot after presenting a petition sell the debt and the right to proceed with the petition. *Paris Skating Rink Co.*, 5 Ch. D. 959.

N.B.—This decision is based on grounds of public policy. See Buckley, 9th Ed., p. 319, F.N. (l). Z

(3) Petition by creditors for less than Rs. 500.

(a) A creditor may petition though his debt does not exceed Rs. 500. The right of a creditor to present a petition is founded on S. 131, *infra*, which fixes no limit as to the amount of the debt. See Buckley, 9th Ed., p. 309. See, also, *Yate Collieries Co.*, (1883) W.N. 171; *London and Birmingham Alkali Co.*, 1 De. G. F. & J. 257. A

(b) But the Court will treat the Rs. 500 limit in the section as a guide to the stake which the petitioner ought to have, and will refuse to make an order on the petition of a creditor for a very small amount or will make it without costs. See, *Re Milford Docks Co.*, 23 C.D. 292; *Herbert Standring & Co.*, (1895) W.N. 99; *Fancy Dress Balls*, 43 S.J. 657=(1899) W.N. 109. B

(c) If, however, the petition of a creditor for less than Rs. 500 is supported by creditors for upwards of Rs. 500, the usual order will be made. *Leyton and Walthamstow Cycle Co.*, (1901) W.N. 225=50 W.R. 95.

N.B.—In insolvency proceedings, a petition by two creditors whose debts together amount to more than Rs. 500 may petition, though the debt of each creditor is less than Rs. 500. See Presidency Towns Insolvency Act, III of 1907, S. 12 (1) (a), and Provincial Insolvency Act, III of 1907, S. 6 (4) (a), see, also, *In re Andrew*, 1 Ch. D. 358. C

2.—“Has served....a demand.”

(1) Demand how served when there is no registered office.

If a Company has no registered office, demand may be served at the Company's unregistered office. *British and Foreign Gas, etc. Co.*, 13 W.R. 649=12 L.T. 368=11 Jur. N.S. 559. D

(2) Order based on excessive demand—Validity of:

An order made on the petition of a creditor for more than Rs. 500 is not bad because it is based on a demand which subsequently turns out to be excessive. *Cardiff Coal Co. v. Norton*, 2 Ch. 405, 410. E

(3) Demand not waived by reasonable delay.

A creditor who does not present a petition immediately on the expiration of three weeks does not waive his demand by a reasonable delay. *Imperial Hydropathic Hotel Co.*, 49 L.T. 147. F

3.—“The Company has....of the creditor.”

(1) Inability to pay debts—Proof of.

This sub-section lays down one of the ways in which the inability of a Company to pay its debts can be proved. A creditor who relies on the statutory demand and non-payment under this section must wait till the twenty one days have expired. Till then he has no ground for his petition. *Catholic Publishing Co.*, 33 L.J. Ch. 325 = 2 D. J. & S. 116.

N.B.—But this is not the only mode of proving the insolvency of a Company. See notes under cl. (c), *infra*. G-H

(2) Debt *bona fide* disputed.

(a) An order will not be made on the petition of a creditor where there is a *bona fide* dispute as to the amount due though it is admitted to exceed five hundred rupees. See *Brighton Club Co.*, 35 Beav. 204; also *Exp. Owen*, 4 L.T. 684; *Cunninghame v. Walkinshaw Oil Co.*, 14 C. of S. Cas. 87 (S. C.).

N.B.—For, the word “neglected” in the section does not necessarily mean “omitted” but it means “omitted to pay without reasonable excuse.” *London and Paris Banking Co.*, 19 Eq. 444. I

(b) In the case of a disputed debt the Court will dismiss the petition if there is no reason to believe that if the debt is established the Company will be unable to pay. *London Wharfing Co.*, 35 Beav. 204. J

(c) Or the petition may be ordered to stand over with or without security until the debt is established in action. *Catholic Publishing Co.*, 2 D.G.J. & S. 116; *Inventor's Assn.* 2, Dr. & Sm. 553. *Compagine Generales Asphaltes*, W.N. (1883) p. 17; *London and Paris Banking Corporation*, 19 Eq. 444. K

N.B.—Where the Company denies insolvency, mere non-compliance with a statutory notice is no evidence of insolvency. *London and Paris Banking Corporation*, 19 Eq. 444. L

(d) A winding-up petition is not the right method of enforcing payment of a debt that is *bona fide* disputed by the Company. *Catholic Publishing Co.*, 2 D. G.J. & S. 116; *Rhodesian Properties*, (1901) W.N. 130; *London and Paris Banking Corporation*, 19 Eq. 444; *Brighton Club Co.*, 35 Beav. 204. M

(e) But if the debt is not disputed on some substantial ground, the Court will not grant an adjournment but will proceed to hear the dispute itself on the hearing of the petition. *King's Cross Dwellings Co.*, 11 Eq. 149; *Imperial Silver Quarrie*, 16 W.R. 1220; *Brighton Club Co.*, 35 Beav. 204; *Imperial Hydropathic Hotel*, 49 L. T. 147; *Great Britain Mutual Society*, 16 Ch. D. 247. N

(3) Petition presented in bad faith.

(a) The Court will dismiss a petition presented in bad faith. *Re Metropolitan Saloon Omnibus Co.*, *E.P. Hawkins*, (1859) 28 L.J. Ch. 830 = 5 Jur. (N.S.) 922. O

(b) The Court has an inherent jurisdiction to restrain an abuse of its process, and may dismiss a petition presented ostensibly for a winding up order but really to exercise pressure on the Company. See *Re Advance Boiler Company* (reported as *Re A Company*), 1894, 2 Ch. 849; *Re Gold Hill Mines*, 23 C.D. 210; *Compagine Generale, E.P. Neuchatel Co.*, (1883) W.N. 17. P

3.—“*The Company has.... of the creditor*”—(Concluded).

(4) Damages for presenting a petition in bad faith.

The presentation of a winding-up petition falsely, maliciously and without reasonable cause is actionable without proof of special damage or pecuniary loss, for the presentation of the petition is from its nature calculated to injure credit. *Quartz Hill Co. v. Eyre*, 11 Q.B. Div. 674; *Cf. South Hetton Coal Co. v. North Eastern News*, (1894), 1 Q.B. 133. Q

(5) Injunction to restrain presentation of petition.

(a) As a solvent Company may sustain great damage by the presentation of a winding-up petition by an unreasonable creditor, whose debt the Company is willing and able to pay, if established, but to whom, the Company *bona fide* think they are not indebted, the Court will, at the instance of the Company, restrain the presentation of petition or may, even after presentation, restrain the advertisement of the petition and stay all proceedings and remove the petition from the file. See *Circle Restaurant Co. v. Levery*, 18 C.D. 555; *New Traveller's Chambers v. Cheese*, 70 L.T. 271; *Cadis Water Works Co. v. Barnett*, 19 Eq. 182; *Brown v. Keeble*, (1879) W.N. 173; *Merchant Banking Co of London v. Hough*, (1874) W.N. 280; *Niger Merchant Co. v. Cupper*, (1877) 18 Ch.D. 557 n. R

(b) Thus, C claimed £ 500 from the Company for services, and the Company said they owed C only £ 260, and had a set-off for this and C threatened to wind-up the Company if he was not paid; the Company was solvent and an injunction was granted to restrain C from bringing the petition. *Niger Merchant Co. v. Cupper*, (1877) 18 Ch.D. 557 n.

N.B.—So also, the publication of a libel likely to injure a friendly society or joint stock society may be restrained by an injunction. *Hill v. Hart Davies*, 21 Ch. D. 798; but see *Liverpool Stores v. Smith*, 37 Ch. D. 170. S

4.—“*Whenever it is proved.... its debts.*”

(1) Scope of cl. (c).

The particular indications of insolvency mentioned in clauses (a) and (b) are all included in clause (c), and under this clause insolvency may be shown in any way other than those mentioned in clauses (a) and (b). See Buckley, 9th Ed., p. 310. T

(2) Instances of inability to pay debts, under cl (c).

(a) Where a bill of exchange accepted by a Company in part payment for goods purchased by it was dishonoured, this was held to be sufficient proof of the insolvency of the Company, though no demand had been made or execution levied. *Globe Steel Co.*, 20 Eq. 337. U

(b) Similarly, a notice given by the Company to a judgment-creditor, that it has no assets on which he can levy execution is sufficient proof of its inability to pay debts, and the judgment-debtor need not actually proceed to execute the decree before he can petition. *Flagstaff Mining Co.*, 20 Eq. 268; *Yate Collieries Co.*, W.N. (1883) 171. Y

N.B.—If the Company admits insolvency, a share-holder cannot prevent the passing of a winding-up order on the petition of a creditor, order by offering to pay the petitioner's debt. *Pavy's Fabric Co.*, 1 C. D. 631 = 24 W.R. 91. W

4.—“Whenever it is proved....its debts”—(Concluded).

(3) Facts not amounting to sufficient proof of insolvency.

(a) Calling a meeting of principal directors, stating that the Company is carrying on business at a loss and is short of working capital, and asking for execution of credit. *Per Baggallay L. J. in Phoenix Bessemer Steel Co.*, 4 C. D. 103. X

(b) A bare statement of a director that the Company is unable to pay its debts. 2nd Jur. N.S. 94.

N.B.—To prove the insolvency of the Company the Court will not order it to produce its documents. *European Assurance Society*, 18 W.R. 9. Y

130. The expression “the Court” as used in this Part of this Act shall mean the principal Court having original civil jurisdiction in the place in which the registered office of the Company is situate¹, unless in the regulations for the management of the Company it shall be stipulated that the Company, if wound up, shall be wound up by the High Court of Judicature at Fort William, Madras, or Bombay (as the case may be), or by the Chief Court of the Punjab, in which case the word “Court” shall mean the said High Court or Chief Court (as the case may be) in the exercise of its original civil jurisdiction.

The expression “debts” as used in this Part of this Act means Definition of debts actually due, of which the creditor could “debts.” claim immediate payment², except in the case of a Company issuing or liable under policies of assurance upon human life within British India, or granting annuities upon human life within British India. In the case of such a Company (hereinafter called a life assurance Company), the expression “debts,” as so used, includes also contingent or prospective liability under policies and annuity and other existing contracts.

(Notes).

1.—“The expression....is situate.”

(1) Object of the section.

The object of the Act in vesting the winding-up jurisdiction solely in the principal Court of original civil jurisdiction is to provide a Court of high competence to deal with matters often involving large interest and complex questions. 17 A. 253 (254) = (1895) W.N. 97. Z

(2) “Court,” meaning of.

(a) The Court in which a suit must be brought for a Company’s liquidation is the principal Court having original civil jurisdiction in the place in which the principal registered office of the Company is situate, but it is not necessary that such Court should hold its sitting at the place where the registered office of Company is situate. 17 A. 252 = 1895 A.W.N. 97. A

1.—“The expression....issituate ”—(Concluded)

(b) A Company registered at Bombay only cannot be wound up by the High Court in Calcutta. 1 Ind. Jur. N.S. 330. B

(3) Limited Company managed by directors in Calcutta—Registered office in London—Jurisdiction of High Court.

The High Court of Calcutta can wind up a limited Company, managed virtually by directors in Calcutta, and carrying on business exclusively in India, though it has its registered office in London and was formed there under the English Companies Act, in spite of the inconvenience that might be caused by the currency here and in England. 5 C. 888.

N.B.—For Courts having jurisdiction to wind up Companies in England, Scotland and Ireland, see Ss. 131, 134 and 136 of the English Companies (Consolidation) Act of 1908. C

2.—“The expression ‘debts’....immediate payment.”

Definition of “debts”—Difference between English and Indian Laws.

For the difference between English and Indian Laws as to the meaning of the expression “debts” in relation to winding-up proceedings. see notes under S. 131, *infra*. D

131. Any application to the Court for the winding-up of a Company under this Act shall be by petition ¹, or by which may be presented by the Company ², or by any one or more creditor or creditors ³, contributory or contributories ⁴, of the Company, or by all or any of the above parties, together or separately.

Application for winding-up to be made by petition.

The petition must allege facts which, if proved, will justify an order for winding-up the Company ⁵. Every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the Company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

In the case of a life-assurance Company the Court shall not give a hearing to the petition until security for costs for such amount as the Judge thinks reasonable is given, and until a *prima facie* case is also established to the satisfaction of the Judge; and where the Company has an uncalled capital of an amount sufficient, with the future premiums receivable by the Company, to make up the actual invested assets equal to the amount of the estimated liabilities, the Court shall suspend further proceedings on the petition for a reasonable time to enable the uncalled capital, or a sufficient part thereof, to be called up; and, if at the end of the original or any suspended time for which the proceedings have been suspended such an amount has not been realised by means of calls as with the already invested

assets is equal to the liabilities, an order shall be made on the petition as if the Company had been proved to be unable to pay its debts.

Explanation.—Nothing in this section authorises the presentation of a petition by a member of a Company who is indebted to the Company in respect of a call made, or other moneys due ⁶.

(Notes).

General.

Corresponding English Law.

The first para of this section corresponds to S. 137, sub-S. 1 of the English Companies (Consolidation) Act of 1908 without the proviso to that subsection. The second sentence in the second para corresponds to S. 138 of the English Act.

Under the English Law a contingent or prospective creditor of any Company is entitled to present a winding-up petition, but the Court shall not hear his petition until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding-up has been established to the satisfaction of the Court. (S. 137 (1) proviso (c) of the Consolidation Act). But under the Indian Act the right of a contingent or prospective creditor is limited to cases of Life Assurance Companies.

Under the English Law a petition may be presented on the ground of default in filing the statutory report or in holding the statutory meeting. But such petition can be presented only by a shareholder and that only after the expiration of fourteen days after the last day on which the meeting ought to have been held. (S. 137 (1) proviso (b) of the Consolidation Act).

Where a Company is being wound up voluntarily or subject to supervision in England, a petition may be presented also by the official receiver attached to the Court, but the Court shall not make an order on the petition unless it is satisfied that the voluntary winding-up or winding-up subject to supervision cannot be continued with due regard to the interest of the creditors or contributories. S. 137 (2), (*Ibid.*)

The English Act contains no provision corresponding to the explanation to the present section. E

1.—“ Any application....petition.”

(1) Petition presented in bad faith.

(a) A petition presented in bad faith will be dismissed. *Re Metropolitan Saloon Omnibus Co.*, *E.P. Hawkins*, (1859), 29 L.J. Ch. 830=5 Jur. (N.S.) 922. F

(b) Thus where certain creditors, whose petition for winding-up was dismissed with costs, induced a share-holder to present a petition for the purpose of annoying the Company, the petition of the shareholder was dismissed on the ground that it was presented in *bad faith*. (*Ibid.*)

N.B.—As to the liability of a person who presents a petition maliciously, and as to the jurisdiction of the Court to restrain the presentation of such petitions, see notes under S. 129, *supra*. G

(2) Registration after petition to wind up, void.

The registration of a Company after the presentation of a petition to wind it up is a nullity. *Hercules Insurance Co.*, 11 Eq. 321. H

2.—“Presented by the Company.”

Petition by Company.

- (a) “A petition may be presented by the Company, that is to say, by a majority of its directors acting within their powers. But it is seldom advisable that the Company should be the petitioner.” *Emden's Winding-up of Companies*, 8th Ed., p. 34. I
- (b) If a Company is in difficulties it usually prefers a voluntary winding-up, but there may be no cases (e.g. when there is a deadlock in the management) when a compulsory order is the only way out of the difficulty. *Evans and Cooper*, p. 178. J

3.—“By any one or more creditor or creditors.”

(1) Creditor's position.

In order that a person may present a petition as a creditor, there must be an existing debt, either legal or equitable, which he can enforce against the Company. *South Wales Atlantic Steamship Company*, 2 Ch. D. 763; *Law Courts Chambers Co.*, 61 L.T. 669; *Rhodesian Properties*, (1901) W.N. 130; *Dunderland Iron Ore Company*, (1909) W.N. 23; *Re United Club Co.*, (1889) 60 L.T. 665. K

(2) Creditor's right to an order.

(a) A creditor who is unable to obtain payment of his debt is entitled *ex debito justitiæ* as between himself and the Company to an order on his petition, on making out a case within the Act. He need not give time. See *West Hartlepool Iron Works*, 10 Ch. 618; *Wear Engine Works*, 10 Ch. 188; *London Suburban Bank*, 6 Ch. 641, 643; *Western Bank of Canada Oil Co.*, 17 Eq., 1; *Kras Napolsky Restaurant*, (1892), 3 Ch. 174; *the Hope etc., Society*, 11 H.L.C. 389; *General Co. for Promotion of Land Credit*, 5 Ch. 363, 390, affirmed in 5 H.L. 176; *Home Assurance Association*, 12 Eq. 112; *International Contract Co.*, 14 L.T. 726. L

(b) When a valid debt is established and not satisfied, it is not a discretionary matter with the Court to say whether the Company shall be wound up or not. One would not like to say positively that no case would occur in which it would be right to refuse it, but, ordinarily speaking, it is the duty of the Court to direct a winding-up. *Per London Cranworth Bowes v. The Hope etc., Society*, 11 H.L.C. 389; *General Co., for Promotion of Land Credit*, 5 Ch. 363, 390, affirmed in 5 H.L. 176. M

(c) As between himself and the Company an unpaid creditor who proves insolvency of the Company is entitled to a winding-up order, and the Company cannot prevent it by alleging that there are no assets. See *Chapel House Colliery*, 24 Ch.D. 259; *Re Crigglestone Coal Co.*, (1906) 2 Ch. 327; *Krasnapolsky Restaurant*, (1892) 3 Ch. 174; *Russell Codner & Co.*, (1891), 3 Ch. 171, 175. N

(d) The right of a creditor to an order is, however, not his individual right but a representative right as one of a class, and is subject to the powers vested in the Court by ss. 140, 193, *infra*, and having regard to the wishes of the majority of creditors or arbitrators, the Court may pass a compulsory order or a supervision order, or may dismiss or adjourn the petition. See *Uruguay Central Ry. Co.*, 11 C.D. 372; *West Crigglestone Coal Company*, (1906), 2 Ch. 327, 331; *Hartlepool Co.* 106 Ch. 18; *New Oriental Bank*, (1892) 3 Ch. 563; *Chapel House Colliery Co.*, 24 C.D. 259; *Langley Mill Steel Co.*, 12 Eq. 26; *Universal*

3.—“By any one or more creditor or creditors”—(Continued).

Drug Assn., 22 W.R. 675; *Western Bank of Canada Oil Co.*, 18 Eq. 1; *Great Western Coal Co.*, 21 C.D. 769; *St. Thomas Dock Co.*, 2 C.D. 116. O

(e) But where unsecured creditors do not oppose, the Court should make a winding-up order if such order will be useful though not necessarily fruitful. *Per* Buckley, J. in *Re Crigglesstone Coal Co.*, (1906) 2 Ch. 327. P

(f) Even where there is nothing to wind-up, an order may be justified as a means of bringing to an end a vicious career. *Crigglesstone Colliery*, (1906), 2 Ch. 327, 333, and other cases cited in Buckley, 9th Ed., p. 301. Q

(g) An order to wind-up will not be refused on a creditor's petition where the Company is admittedly insolvent, merely because a share-holder undertakes to pay off the creditor's claim. *Pavy's Fabric Co.*, 24 W.R. 91. R

(h) A creditor, who under the constitution of the Company has a special remedy to enforce the payment of his debt, is not *exdebiti justitie* entitled to an order until the remedy has been tried and filed. *Exmouth Dock Co.*, 17 Eq., 181. See, also, *Herm Bay Co.*, 10 Ch. D. 42. S

(i) Thus while the debenture holders of a Company were empowered by an Act of Parliament to obtain payment of the principal and interest secured by the debenture by appointing a receiver, the Court refused to make an order on the petition of debenture-holders who had not tried to obtain payment of their debts by the appointment of a receiver. (*Ibid.*) T

(3) Petition by assignee of a debt.

(a) An assignee of a debt may present a winding-up petition. See S. 129, *supra*; see, also, *London etc., Alkali Co.*, 1 De. G. F. & J. 257; *Montgomery Moore Ship etc. Co.*, (1903), W.N. 121; *Oreagam Gold Mining Co.*, 29 Sol. J. 204; *Paris Skating Rink Co.*, 5 Ch. D. 959. U

(b) But a creditor cannot, after presenting the petition, sell the debt and the right to proceed with the petition. *Paris Skating Rink Co.*, 5 Ch. D. 959. V

(4) Creditor under voluntary liquidation.

(a) An order may be made on the petition of a person who has become a creditor under an arrangement in a voluntary liquidation of the Company, between himself, the voluntary liquidators and the Company. *Re Bank of South Australia*, (2) (1895) 1 Ch. 578. W

(b) But such creditor cannot obtain a supervision order. *Re Bank of South Australia*, (1) (1894), 3 Ch. 722. X

(5) Executor of creditor.

The executor of a creditor may present a petition before he obtains probate. It is enough if he obtains probate before the hearing of the petition. *Masonic and General Life Assurance Co.*, 32 Ch. D. 373. Y

(6) Secured creditor.

A secured creditor may without losing the benefit of his security, present a petition. *Moor v. Anglo Italian Bank*, 10 Ch.D. 681, 689; *Great Western Coal etc., Co.*, 21 Ch.D. 769. Z

N.B.—But a mortgagee who presents a petition will not be allowed to exercise his right of sale under the mortgage, until the hearing of the petition. *Cambrian Mining Co.. Exp. Fell*, 29 W.R. 881.

3.—“By any one or more creditor or creditors” —(Continued).

(7) Debenture holder.

- (a) A debenture holder can present a petition if the Company have covenanted to pay the holder or bearer of the debenture the sum secured thereby, and if the amount secured has become payable. *Chapel House Colliery Co.*, 24 C. D. 259; *Western Bank of Canada Oil Co.*, 17 Eq. 1; *Olathe Silver Mining Co.*, 27 C. D. 278; *St. Thomas Dock Co.*, 2 C.D. 116. **A**
- (b) But, if the covenant to pay has been entered not with the debenture holders, but with a trustee for him, the debenture holder is not a “creditor” entitled to petition. *Uruguay, etc. Ry. Co.*, 11 C.D. 372; see, also, *Dundarland Iron Ore Co.*, (1909) W.N. 23. **B**
- (c) A deposit of bearer debentures, by way of mortgage, can present a petition. *Olathe Silver Mining Co.*, 27 C.D. 278. **C**

(8) Judgment creditor.

- (a) A judgment creditor is entitled to present a petition, and if the Company alleges that the judgment was obtained by fraud, he cannot be required to refuse the allegation by going into further evidence in support of his claim, as a preliminary to his right to an order. *Bowes v. Hope Insurance Society*, 11 H.L.C. 389; see, also, *Exp. Lennox*, 16 Q.B.D. 315; *London India Rubber Co.*, 1 Ch. 329, 331. **D**
- (b) But if the Company undertakes to bring an action within a certain time to set aside the judgment, the petition may be ordered to stand over. *Bowes v. Hope Insurance Society*, 1 H.L.C. 389. **E**
- (c) If upon hearing the petition there is before the Court sufficient evidence to show that the judgment was obtained by fraud, the Court may dismiss the petition though the judgment has not been impeached in an action. *United Stock Exchange Co.*, 51 L.T. 687. **F**
- (d) If the judgment is reversed on appeal before the hearing of the petition, the petition will be dismissed with costs, although a further appeal may be pending. *Anglo Bavarian Steel Bale Co.*, (1899) W.N. 80; *Re Charles, Ltd.*, 51 Sol. J. 101. **G**

(9) Prospective or contingent creditor.

- (a) Under the Act except in the case of Life Assurance Companies, the petitioning creditor's debt should be presently payable, i.e., it should not be prospective or contingent. This was also the English Law before the Act of 1907 came into force. **H**
- (b) Thus, a landlord cannot petition in respect of rent for the expired portion of a term. For, such rent is not a debt presently payable; the rent for the whole term becomes due only on the expiration of the term. *United Club Co.*, (1889) W.N. 67. **I**
- (c) Similarly the holder of a bill of exchange which has not matured is not a creditor entitled to petition though the Company has given notice that the bill would not be met at maturity. *Re W. Powell & Sons*, (1892) W.N. 94. **J**
- (d) So also is the holder of debenture stock to whom nothing is presently payable. *Melbourn Brewery*, (1901) 1 Ch. 453. **K**

N.B.—(i) If debentures specify a time and place for payment of interest, and provide that on default of payment of interest the principal shall

3.—“By any one or more creditor or creditors”—(Continued).

become immediately payable, the principal does not become due unless payment has been demanded at the specified place. *Thorn v. City Rice Mills*, 40 Ch. D. 357. See Buckley, 9th Ed., p. 303. **L**

(ii) The rule that a debtor must seek the creditor for payment of the debt, does not apply, if a place for payment is specified. (*Ibid.*) **M**

(iii) For the difference between the present English Law and the Indian Law as to a prospective or contingent creditor's right to petition, see notes to this section under the heading “General,” *supra*. **N**

(iv) Even under the Indian Act as under the English Law before 1907, it seems that though a Company is able to pay its existing debts it may be ordered to be wound up under the just and equitable clause of S. 128, *supra*, if it is commercially insolvent. See *European Life Assurance Co.*, 9 Eq. 122; *British Oil Co.*, 15 L.T. 601. **O**

(v) Subscribed but uncalled capital must, in the absence of evidence of the insolvency of shareholders, be regarded as an asset. *European Life Assurance Soc.*, 9 Eq. 122; *British Oil Co.*, 15 L.T. 601. **P**

(10) Persons not entitled to petition.

(a) A surety of the Company who has not been called to pay anything. *Iron Colliery Co.*, 20 C.D. 442. (Ev. 35). **Q**

(b) An unpaid vendor of land taken by a Company under compulsory powers before his title has been accepted. *Milford Docks Co.*, 23 C.D. 292. **R**

(c) An officer of the Company who claims remuneration under an Article, not under any contract entered into with the Company. *Rhodesider Properties* (1901) W.N. 180, cited in Emden's Winding-up of Companies, 8th Ed., p. 35. **S**

N.B.—The articles of association only constitute a contract between the Company and the members in respect of their rights as share-holders. They do not constitute a contract between members and outsiders or members in their individual capacities. See *Eley v. Positive Government Security Life Assurance Company*, (1875) 1 Ex. D. 20= (1876) 1 Ex. D. 88; *Re Rotherham Alum and Chemical Co.*, (1883) 25 C.D. 103; *Bronne v. La Trinidad*, (1897) 37 C.D. 1; *Pritchard's case*, (1873) 8 Ch. 956; *Baring Gould-Sharphington Combined Pick and Shovel Syndicate*, (1899) 2 Ch. 80. **T**

(d) A person, who has lent money to a Company which it is not entitled to borrow, is not entitled to petition. *National &c., Building Society*, 5 Ch. 309. **U**

(e) A garnishor of a debt due from the Company is not a creditor of the Company. The debtor of the garnishor remains the creditor of the Company. But if the garnishor brings an action on the garnishee order against the Company and obtains a judgment, he becomes a judgment-creditor of the Company and can then present a petition. *Combined Weighing Co.*, 43 Ch. D. 99, 105; *Law Court's Chambers*, (1889) W.N. 189; *Pritchett v. English and Colonial Syndicate*, (1899), 2 Q.B. 428. **Y**

(f) A person who claims unliquidated damages is not a creditor entitled to present a petition. The claimant must change his claim for damages into a judgment before he can petition. *Pen-y-Van Colliery Co.*, 6 Ch. D. 477. *Oriental Commercial Bank*, 15 L.T. 8. **W**

3.—“By any one or more creditor or creditors”—(Concluded).

(11) Creditor should have substantial interest in the debt.

An order will not be made on the petition of a creditor, if it appears that he has substantially lost his interest in the debt by attachment, charge, or otherwise. See *European Banking Co.*, 2 Eq. 521. Also *Pentalta Exploration Co.*, (1898) W.N. 55. X

N.B.—But it is no objection to an order that the creditor has agreed to refer all the matters in dispute to arbitration, and though the arbitrator has made the award, provided it has not been taken up. *Lancaster and Newcastle-upon-Tyne Ry Co.*, 5 Rail. & Can. Cases, 632 cited in *Emden's Winding-up of Companies*, 8th Ed., p. 41. Y

4.—“Contributory or contributories.”

(1) Contributory's right to petition.

(a) The right of a contributory to present a winding-up petition cannot be restricted or excluded by any provision in the Articles of Association. *Peveril Gold Mines*, (1898) 1 Ch. 122. Z

(b) Nor can the right be affected by a contract between the Company and an individual member. *Punt v. Symons, & Co.*, (1908) 2 Ch. 506; *Cf. Baily v. British Equitable Assurance Co.*, (1904) 1 Ch. 375. A

(2) Order on contributory's petition, discretionary.

(a) The Court is not bound to make a winding-up order on a contributory's petition. The Court has a wide discretion under the Act, and when the petition is before it, and even before making a winding-up order it may exercise the powers given to it by S. 140, which enables the Court to ascertain the views of creditors or contributories by calling a meeting. See *Emdens Winding-up of Companies*, 8th Ed., p. 27. See, also, *European Life Assurance Society*, 9 Eq. 122, 126; *E.P. Wise*, 1 Drew, 465; *Planet Benefit Society*, 14 Eq. 441, 450; *Middlesborough Assembly Rooms Co.*, 14 Ch. D. 104; *London Suburban Bank*, 6 Ch. 641=19 W.R. 600, 763. B

(b) Thus, the Court will not make an order to wind up a solvent limited company against the wishes of a majority of share-holders, merely because the business has been carried on at a loss and appears likely to continue a losing concern. See *per Lord Cairns, L.J.* in *Suburban Hotel Company*, (1867) L.R. Ch. App. Cas. 737. C

N.B.—But in the case of an unlimited Company, the Court will not refuse to make an order on the petition of a share-holder merely because of the opposition of the majority, for, to do so would involve the petitioner in increased liabilities. *Electric Telegraph of Ireland*, 22 Beav. 471; *Norwich Yarn Co.*, 12 Beav. 366. D

(3) Contributory's petition—Allegations in.

A contributory's petition should allege that the terms of the section have been complied with, but is not demurrable for want of such allegation. *City and County Bank*, 10 Ch. 470; *Glendon Steamship Co.*, (1899) W.N. 114. E

(4) Fully paid shareholder's right to petition.

(a) The holder of fully paid shares is a contributory within the meaning of S. 124, the present section and S. 132, *infra* and a petition for winding-up may be presented. 2 Ind. Jur. N.S. 94. See, also, *Anglesea Colliery Co.*, 2 Eq. 379=1 Ch. 555; *National Savings Bank Association*, 1 Ch. 547; *London Armoury Co.*, 11 Jur. (N.S.) 963; *Cheshire Patent Salt Co.*, 1 N.R. 533. F

4.—“Contributory or contributories”—(Continued).

- (b) His right to petition is not affected by the fact that the Company is already in voluntary liquidation. *Nat. Electricity Co.*, (1902) 2 Ch. 35. G

N.B.—Where petitions were presented by a fully paid share-holder, and a share-holder who paid only a deposit, and the Company did not appear to be insolvent, the conduct of the order was given to the former. *Constantinople Hotels Co.*, 13 W.R. 851. H

N.B.—A fully paid shareholder should allege in his petition and prove that in the event of winding-up he will have a tangible interest in the surplus assets. *Rica Gold Washing Co.*, 11 Ch. D. 36; *New Zealand Quartz Washing Co.*, W.N. 1873, p. 174; *Patent Bread Machinery Co.*, 14 L.T. 582; *Irrigation Co. of France*, 6 Ch. 176. I

(5) Order when may be refused on paid-up share-holder's petition.

- (a) As a fully paid shareholder is not liable to contribute to the assets of the Company, and as his interest is limited to share in the surplus assets in the final adjustment of the rights of contributories, the Court may refuse to pass an order, if his petition is not supported by any other shareholder or creditor and if the Company be recently formed and has not had a fair trial. *Patent Artificial Stone Co.*, 34 Beav. 185=11 Jur. (N.S.) 4=13 W. R. 285=34 L. J. (Ch.) 330; *Patent Bread Machinery Co.*, 14 W.R. 787=14 L.T. 582; *Lancashire Brick and Tile Co.*, 34 Beav. 330=13 W.R. 569; *Irrigation Co. of France*, *E.P. Fox*, 6 Ch. 176, 190; *New Zealand Quartz Co.*, (1873), W.N. 174. J

- (b) Issuing shares at a discount is not a sufficient ground for making a winding-up order on the petition of a fully paid shareholder, even where, if the amounts unpaid on the shares were called up, there would be a surplus to be divided among the members. *Pioneers of Mashonaland Syndicate*, (1893) 1 Ch. 731, cited in Ermden's *Winding-up of Companies*, 8th Ed., p. 43. See, also, *Buckley*, 9th Ed., p. 321. K

(6) Whether a B contributory can petition.

A past member liable as a B contributory is entitled to petition. See notes under S. 132, *infra*. L

(7) Scrip holder, when can petition.

- (a) The holder of a scrip certificate can present a petition if there are surplus assets which he has a right to have distributed. See *Lindley*, 5th Ed., p. 627. M
- (b) He can also petition, if he alleges himself to be a contributory, and undertakes to do all acts necessary to make himself a shareholder. *Littlehampton Steamship Co.*, 34 Beav. 256=2 D. J. & S. 521; *E.P. Capper*, 3 De. G. & Sm. 1; *Wexford etc.*, *Ry. Co.*, 3 De. G. & S. 116. N

(8) Executors of contributories.

Executors of decreed shareholders are contributories and can petition, though their deed of settlement provides that they are not proprietors. *Norwich Yarn Co.*, 12 Beav. 366. O

4.—“Contributory or contributories”.—(Concluded).

(9) Whether share warrant holder can petition.

It is doubtful whether the holder of a share warrant can petition. See *Positive Assurance Co.*, (1877) W.N. 23; *Wala Wynaad Co.*, 21 Ch. 849= 30 W. R. 915. P

5.—“The petition must allege....winding-up the Company.”

(1) Contents of petition.

(a) An order will not be made if a sufficient case is not made out on the petition; defects in it cannot be revived by the evidence. The order must be made *Secundum allegata et probata*. *Steam Stroker Co.*, 19 Eg. 416; *Wear Engine Work*, 10 Ch. 188; *Patent Cocoa Fibre Co.*, (1876) W.N. 132; *Langham Skating Rink Co.*, 5 Ch. Div. 669; *Rica Gold Washing Co.*, 11 Ch. Div. 36. Q

(b) A mere allegation that it is just and equitable that the Company should be wound-up is not sufficient without a statement of the facts which render it just and equitable. *Wear Engine Works Co.*, 10 Ch. 188. R

(c) If fraud is alleged, the facts which constitute it must be stated. *Rica Gold Washing Co.*, 11 Ch. Div. 36. S

(d) A contributory's petition should allege that the terms of S. 132, *infra*, have been complied with but it is not demurrable for want of such allegation. *City and County Bank*, 10 Ch. 470; *Glendomer Steamship Co.*, (1899) W.N. 114. T

(e) A fully paid shareholder who presents a petition must allege and prove, at least to the extent of a *prima facie* case, that there are assets of such amount that in the winding-up he will have a tangible interest. *Rica Gold Washing Co.*, 11 Ch. Div. 36, 43. See, also, *Diamond Fuel Co.*, 13 Ch. Div. 400, 411, cited in Buckley, 9th Ed., p. 321. U

(f) It is not enough to allege that moneys will be recovered from directors or others for misfeasance. *Rica Gold Washing Co.*, 11 Ch. Div. 36, 43. Y

(g) But an order will be made, if a reasonable probability is shown that such sums will be recovered so as to leave a surplus. *Diamond Fuel Co.*, 13 C.D. 400. W

Quare:—Whether a creditor's petition should allege that there will be assets available for distribution. See *Re Crigglestone Coal Co.*, (1906) 2 Ch. 327. X, Y

N.B.—S. 141 of the English Companies Consolidation Act of 1908, which is a re-enhancement of S. 29 of the Companies Act of 1907, provides that the Court shall not refuse to make a winding-up order on the ground only that the assets of the Company have been mortgaged to an amount equal to, or in excess of, those assets or that the Company has no assets. But, even before the Act of 1907 came into force, it was held that as between an unpaid creditor and Company absence of assets was no answer and that an order might be made even though the Company should allege that there were no assets available. *Re Crigglestone Coal Co.*, (1906), 2 Ch. 327. Z

(2) Petition presented in wrong character.

If a person, entitled to petitions in a wrong character, the petition may be amended and an order made upon it. See *Queen's Benefit Building Society*, 6 Ch. 815. A

5.—“The petition must allege....winding-up the Company”—(Continued).

(3) Persons entitled to be heard on the petition.

The persons entitled to be heard on the hearing of the petition are persons served with petition, the Company, any creditor, are any contributories. But the Court can in its discretion hear other persons interested in the order. See *Brodford Navigation Co.*, 9 Eq. 80=10 Eq. 331. **B**

(4) Petitioner's costs.

(a) If a petition is successful, the petitioner's costs are a first charge on the estate and must be paid in full in priority to any costs of the liquidator. *Audley Hall Cotton Spinning Co.*, 6 Eq. 245. **C**

(b) The costs are to be paid to him without any set-off being made against calls that may be payable by him as a contributory. *General Exchange Bank*, 4 Eq. 138; see, also, *Equestrian Buildings Co.*, 1 Meg. 115. **C-1**

(c) But the costs are to be paid only out of the assets of the Company; the petitioner is not, as between himself and debenture holders, entitled to be paid out of assets available for the latter. *New York Exchange*, 1 Ch. 371. **D**

(d) If a creditor proceeds to bring his petition to hearing after an offer made to him to pay or secure his debts and costs, he will not be given costs incurred after the offer. See *Times Life &c. Co.*, 9 Eq. 382; *Imperial Guardian Society*, 9 Eq. 447. **E**

(5) Petitioner not bound to prosecute the petition.

A creditor who presents a petition is not a trustee for other creditors or for shareholders and is not bound to bring the petition to a hearing so as to give the other creditors an opportunity of appearing to support or oppose it. But, subject to the rule as to substituting, another petitioner is entitled to dismiss it or to agree with the Company for its withdrawal upon terms. See *Buckley*, 9th Ed., p. 322. **F**

(6) Withdrawal of petitioning creditor from suit—Right of other creditors to continue proceedings—English and Indian Law.

(a) Under the English Act of 1862, before its amendment by the Amending Act of 1890, it was held that after the withdrawal of the creditor who intended the proceedings, the suit could not be proceeded with at the instance of other depositors and contributories who subsequently joined in his petition. *In re Times Assurance and Guarantee Company*, (1869) L.R. 9 Eq. 382; *In re Home Assurance Association*, (1871) L.R. 12 Eq. 59; *In re Hereford and South Wales Waggon and Engineering Company*, (1874) L.R. 17 Eq. 423. **G**

(b) This rule has been superseded by the rule passed after the enactment of the Amending Act, 1890 and the present practice in England appears to be that when a petitioner consents to withdraw his petition, the Court may constitute as petitioner any creditor or contributory, who in its opinion, would have a right to present a petition and who is desirous of doing so. 31 C. 106 (109). **H**

(c) Although S. 131 of the Indian Act corresponds to S. 82 of the English Act of 1862, still, as the Amending Act of 1890 has in no way altered the provisions of S. 82 of that Act, the rule of practice which has been passed since the Amending Act of 1890 was enacted is equally suited to proceedings taken for the winding-up of Companies in this country as in England. 31 C. 106 (109). **I**

5.—“The petition must allege....winding-up the Company”—(Continued).

(7) Withdrawal by one of several joint petitioners—Effect of.

(a) Where a depositor of a Company applied for the winding-up of the Company, and the Court allowed other creditors and contributories to be made parties to that application, held that the subsequent withdrawal of the original applicant would not operate as a withdrawal of the whole case and the other persons, who were made parties, could proceed with the case. 31 C. 106. J

(b) Apart from the rule as to substituting a new petitioner, the Court will not make an order upon a petition at the instance of other persons appearing upon it, if the petitioner has no case unless until sufficient notice of it be given. But the petition may, in some cases, be treated as amended. See Buckley, 9th Ed., p. 925 and cases there cited. K

(8) Presentation of second petition—Liability for costs.

(a) A creditor who presents a second petition knowing that a petition has already been presented, runs the risk of having to pay the costs, even though the first petition was presented by the Company. See *Accidental and Marine Insurance Company, E.P. Rasch*, 36 L.J. (Ch.) 75=L.T. 173; *Joint Stock Coal Co.* 8 Eq. 146; *Empire Assurance Corporation*, 16 L.T. 341; *Brooke & Co.*, (1888), W.N. 213; *Building Societies Trust*, 44 Ch. D. 140; *Standard Cement Co.*, (1890) W.N. 91, cited in Buckley, 9th Ed., p. 324. L

(b) But if the second petitioner alleges and proves fraud affecting the first petition, the first petition will be dismissed and the second petition will become the first. See Buckley, 9th Ed., p. 325. Also *Norton Iron Co.*, (1877) W.N. 223=47 L.J. Ch. 9; *Building Societies Trust*, 44 Ch. D. 140. M

(c) If a creditor who is in earnest about winding up—finds that a petition has been already presented but suspects fraud, he should, before he presents a second petition, write to the first petitioner requiring to know before a certain day whether or not he is going *bona fide* to press for an order and stating that in default of a satisfactory answer he should present another petition. See *per Jessel, M.R.* in the *Norton Iron Co.* (1877) W.N. p. 223=47 L.J. (Ch.) 9. N

(d) Where a second petition is presented in ignorance of the first, the petitioner will have costs up to the time he becomes aware of the existence of the first petition. *General Financial Bank*, 20 Ch. Div. 276; *Building Societies Trust*, 44 Ch. D. 140; *Sheringham Development Co.*, (1893) W.N. 5. O

(e) He will not be given the subsequent costs unless he has good reason to believe that the first petition was presented in bad faith. (*Ibid.*) See Buckley, 9th Ed., p. 325.

N.B.—The mere advertisement of the first petition does not necessarily raise a presumption of notice. *Marrin Bank Co.*, 38 L.T. 140.

N.B.—Thus where a first petition that was advertised was adjourned *sine die* on coming for hearing, and six months afterwards a creditor an ignorance of its existence presented a second petition he was held entitled to costs. (*Ibid.*) P

(9) Several petitions—Conduct of winding-up.

Where two petitions were presented, one by paid-up shareholder, and the other by shareholders who had only paid a deposit, one order was made on

5.—“The petition must allege....winding-up the Company”—(Concluded).

both the petitions and the conduct of the winding-up given to the paid-up shareholder. *Constantinople and Alexandria Hotel Co.*, 13 W.R. 851; *Berlin Great Market etc.*, 19 W.R. 793. Q

(10) Legal representative of deceased petitioner.

On the death of a petitioner before the hearing, his personal legal representative can obtain an order to carry on the petition. *Dynevor Collieries Co.*, W.N. (1878), p. 199. R

6.—“Nothing in this section....moneys due.”

A shareholder in arrear—English and Indian Law.

(a) The explanation expressly provides that a member, who is indebted to the Company in respect of a call made, or other moneys due, cannot petition. There is no such provision in the English Act. In some English cases it has been held that the fact that a shareholder is in arrears of calls is no bar to his petition, but the Court will not hear the petition until the calls are paid or paid into the Court. See *Diamond Fuel Co.*, 13 Ch. D. 400; *Crystal Reef Gold Mining Co.*, (1892) 1 Ch. 408. S

(b) Or the Court may before hearing the petition require the petitioner to give an undertaking that he will submit to the order of the Court in respect of the payment of calls, so that if the petition succeeds, the Court may require the payment of calls before drawing up the order; and if it fails, the Court may enforce the undertaking and order the payment of calls. *Crystal Reef Co.*, (1892) 1 Ch. 408. T

(c) In some other English cases, it has been held that the petition of a shareholder may be dismissed on the ground that he is in arrear; otherwise a shareholder, upon whom a call has been made may evade the payment of call by presenting a petition. See *European Life Assurance Society*, 10 Eq. 403; *Steam Stoker Co.*, 19 Eq. 416; *Petersburg Gas Co.*, 33 L.T. 637 = 24 W.R. 290; *Joint Stock Coal Co.*, 8 Eq. 146, 152. U

N.B.—But Buckley says “this was rather supplementing the Act than interpreting it.” See Buckley, 9th Ed., p. 321.

132. No contributory of a Company under this Act shall be

Contributory when not qualified to present winding-up petition.

capable of presenting a petition for winding-up such Company unless the members of the Company are reduced in number to less than seven, or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him, or have been held by him, and registered in his name, for a period of at least six months during the eighteen months previous to the commencement of the winding-up¹, or have devolved upon him through the death of a former holder:

Provided that, where a share has, during the whole or any part of the six months, been held by or registered in the name of the wife of a contributory either before or after her marriage, or by or in the name of any trustee for such wife, or for the contributory,

such share shall, for the purposes of this section, be deemed to have been held by and registered in the name of the contributory.

(Notes).

General.

Corresponding English Law.

The two paragraphs of this section correspond to proviso (a) to S. 137, sub-s. (1), and to S. 137, sub-s. (2) respectively of the English Companies (Consolidation) Act of 1908.

Under the English Act a contributory cannot present a petition if the number of members is reduced in the case of private company, below two, or in the case of any other company below seven. The Indian Act draws no distinction between a private company and a public company.

In other respects there is no difference between the provisions of this section and the corresponding English Law. Y

1.—“ Unless the shares . . . commencement of the winding-up.”

(1) “ Held”—Meaning of.

(a) The word “ held” in the section means that the name of the contributory has been on the register of shareholders during the requisite time or ought to have been on the register but for the default of the Company. *Wala Wynaad Mining Co.*, 21 Ch. D. 849=30 W.R. 915; *Patent Steam Engine Co.*, 8 Ch. D. 464. W

(b) Where a trustee was appointed in the liquidation of a contributory during the period of six months but was not registered as a share-holder and his title was lost by the acceptance of a composition, *held*, the contributory in liquidation was entitled to petition, and his holding was not affected by the appointment of the trustee. *Wala Wynaad Mining Co.*, 21 Ch. D. 849=30 W.R. 915. X

(c) Where by an order of the Court made more than six months before the winding-up of a Company, the Company was required to register certain persons as shareholders, but the Company neglected to comply with the order, the persons were held entitled to petition though their names were not on the register. *Patent Steam Engine Co.*, 8 Ch. D. 464. Y

(2) Whether a B contributory can petition.

“ There does not seem to be any doubt that a past member liable as a contributory, can petition. He is of course included under the term “ contributory,” and the enactment which imposes upon a contributory as one qualification for presenting a petition that his shares must have been registered in his name for “ at least six months during the eighteen months before the commencement of the winding-up,” shows that the petition of a B Contributory was intended.” Buckley, 9th Ed., pp. 321, 322. Cf. *Times Fire Assurance Co.*, 596 which was a case under 7 & 8 Vic., Ch. 110. Z

N.B.—For the difference between the English and Indian Laws as to the right of a shareholder in arrear to present a winding-up petition, see notes under S. 131, *supra*. A

Commencement
of winding-up by
Court.

133. A winding-up of a Company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up ¹.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 139 of the English Companies (Consolidation) Act of 1908. B

1.—“A winding-up....for the winding up.”

(1) Commencement of winding-up when order made on several petitions.

Where the order is made on several petitions the date of the presentation of the earliest petition is the date of the commencement of the winding-up. *Kent v. Freehold Land Co.*, 3 Ch. 493. C

N.B.—As to the commencement of voluntary winding-up, see S. 174, *infra*.

(2) Date of commencement, when voluntary winding-up, is followed by compulsory order.

(a) Where a voluntary winding-up is superseded by a compulsory order, the winding-up will date from the presentation of the petition for compulsory winding-up and not from the date of the resolution for voluntary winding-up. *Taurine Co.*, 25 Ch. D. 118; see, also, *West Cumberland Iron, etc., Co.*, 40 C.D. 361. D

(b) In *United Service Co.*, 7 Eq. 76, it was held that if a compulsory order was made after a supervision order, the winding-up, commenced on the date of the passing of the voluntary resolution, and not on the date of the presentation of the petition. D-1

N.B.—This case was doubted and criticised in *Taurine Co.*, 25 Ch. D. 118.

(3) Date of commencement when supervision order made.

(a) Where a resolution for voluntary winding-up is followed by a supervision order the date of the commencement of the winding-up is the date of the resolution; for, the supervision order merely directs the continuance of the voluntary winding-up subject to the Court's supervision. See *Buckley*, 9th Ed., p. 411; *Emden's winding-up of Companies*, 8th Ed., p. 137. E

(b) It makes no difference whether the petition on which the supervision order is made is a petition for compulsory order or one for a supervision order, and whether the petition was presented before the date of the resolution for voluntary winding-up or after that date. See *Weston's case*, 4 Ch. 20. F

(4) Importance of the date of the commencement of winding-up.

The date of the commencement of winding-up affects many matters.

(a) Thus if a person who has been induced by misrepresentation, to become a share-holder brings an action for rescission of his contract to take shares after the presentation of a winding up petition, the action will be defeated if a compulsory order is made on the petition. *Kent v. Freehold Land and Brickmaking Co.*, 1868, 3 Ch. App. 493. G

1. — "A winding-up....for the winding up"—(Concluded).

- (b) Again, where a Company is being wound up by the Court, or subject to supervision, all dispositions of its property, and every transfer of its shares or alteration in the status of the members made between the commencement of the winding up and the date of the order, is, unless the Court otherwise directs, void. See S. 197, *infra*. H
- (c) The date of the commencement of winding up will also be material to determine whether a past member is liable as a B contributory, and in some cases to determine whether a person who has ceased to be member is liable as a B contributory or A contributory. See S. 61, *supra*. I
- (d) It would also be material to determine whether a conveyance or other transaction is invalid as a fraudulent preference. See S. 213, *infra*. J
- (e) Also determine the validity or otherwise of certain attachments, distresses and executions put in force against the estate or effects of the Company. See S. 212, *infra*. K
- (f) The date of commencement of the winding up may also be important in applying the Rules of Insolvency to winding-up proceedings. See *Halsbury's Laws of England*, p. 419. L

134. The Court may, at any time after the presentation of the petition for winding-up a Company under this Act, and before making an order for winding-up the Company, upon the application of the Company or of any creditor or contributory of the Company, restrain further proceedings in any suit or proceeding against the Company ¹, upon such terms as the Court thinks fit ².

The Court may also, at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the Company ³.

(Notes).

General.

Corresponding English Law.

The first para of this section corresponds to S. 140 of the English Companies Consolidation Act of 1908.

That section also provides that where the action or proceeding sought to be restrained is pending in the High Court or Court of Appeal in England or Ireland, the application should be made to the Court in which the action or proceeding is pending. In other cases the application should be made to the Court having jurisdiction to wind up the Company.

Para 2 of the present section corresponds to S. 149 (2) of the English Act, which provides that provisional liquidators may be appointed after the presentation of a petition and before (where the proceedings are in England) the making of an order for winding up, or (where the

General—(Concluded).

proceedings are in Scotland or Ireland) the first appointment of liquidators. S. 149 (3) of the English Act provides that where the proceedings are in England, the official receiver or any other fit person may be appointed as a provisional liquidator before a winding up order is made. After the winding up order the official receiver becomes the provisional liquidator by virtue of his office, and shall continue to act as such until he or another person becomes liquidator and becomes capable of acting as such.

1.—“Restrain further proceedings...against the Company.”**(1) Object of the section.**

As the main purpose of the Act is the collection and distribution of the assets of Companies for the general benefit of their creditors, and amongst the creditors *pari passu*, this section confers on the Court a discretionary power to interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit. See per Turner L.J., in *Smith, Fleming & Co.'s case*, X Ch. 538, 545. **M**

(2) Application of the section.

(a) Under this section the Court has jurisdiction to stay actions and other proceedings against a Company after the presentation of a winding-up petition and winding-up order is made. **M-1**

(b) The provisions of this section apply to Companies registered under this Act including those registered under Part VII, *infra*, to Companies formed and registered under the Joint Stock Companies Acts XIX of 1857 and VII of 1860, or either of them, to Companies registered but not formed under the said Acts or either of them and also to unregistered companies under Part VIII *infra*. See Ss. 221, 222, 240, 241, 243 and 245, *infra*. **N**

(c) In the case of Companies registered under Part VII, and unregistered Companies under Part VIII, the Court has also jurisdiction to stay proceedings against contributories, but the application for stay can be made only by a creditor, and cannot be made either by the Company or by a contributory, whereas proceedings against the Company can be restrained on the application of the Company. any creditor or any contributory. See Ss. 241 and 245, *infra*. **O**

(3) Stay of proceedings against a Company wound up under supervision.

The Court has also jurisdiction to restrain proceedings against a Company after the presentation of a petition for a supervision order, and before the making of such order; for, Ss. 192 and 195 *infra* provide that a petition for a supervision order, and a supervision order shall, for purposes of giving jurisdiction over actions against the Company be deemed to be a petition and order for winding up by the Court. **O-1**

N.B.—As to the stay of proceedings against a Company involuntary liquidation, see notes under S. 182, *infra*.

(4) Stay of proceedings against a Company in voluntary liquidation.

By S. 182, *infra*, the Court may, on the application of the liquidator, a contributory or a creditor of a Company in voluntary liquidation, exercise all the powers which it may exercise if the Company were being wound up by the Court. The Court may therefore under that section, restrain

1.—“*Restrain further proceedings....against the Company*”—(Continued).

actions, executions and distresses against a Company in voluntary liquidation. See *Keyshan Co.*, 33 Beav. 123; *Thomas v. Patent Lionite Co.*, 17 Ch. Div. 250; *Westbury v. Twigg*, 1892, 1 Q.B. 77; *Roundwood Colliery Co.*, 1897, 1 Ch. 373. P

(5) *Proceedings before and proceedings after a winding-up order, distinguished.*

Under the present section and Ss. 241 and 245 *infra*, the Court has a discretionary power to stay actions and other proceedings against a Company after the presentation of the petition and before a winding-up order is made. But Ss. 136, 242 and 246 peremptorily stay proceedings after an order has been made until leave of the Court has been obtained to proceed with them. See *Buckley* 9th Ed. p. 327. Q

(6) *Attachments distresses and executions after winding-up order.*

(a) By S. 212, *infra* (corresponding to S. 211 of the English Act), where a Company is being wound up by or subject to the supervision of the Court, any attachment, distress or execution put in force against the estate or effecting of the Company after the commencement of the winding-up shall be void. Q-1

(b) An execution is said to be “put in force” within the meaning of S. 212 when the officer entrusted with the execution enters into possession and seizes the property of the judgment-debtor. See *London and Devon Biscuit Co.*, 12 Eq. 190, 193. R

(c) S. 212, therefore does not apply if execution has been levied by seizure before the commencement of winding-up, though the property has not been sold. But though S. 212 does not apply, a sale is a proceeding within this section and S. 136, *infra*, and the Court can, after commencement of winding-up, restrain it, though execution has been perfected before the winding up. *Perkins Beack Co.*, 7 Ch. D. 371; *Asiatic Colour Painting Co.*, 14 Ch. D. 502. S

(d) Likewise, the Court may restrain a sale by a landlord under a distress levied before commencement of winding up but not then completed by sale. *Roundwood Colliery Co.*, 1897, 1 Ch. 373. T

(e) Where in execution of a decree the sheriff entered the premises (a theatre) of the judgment-debtor and after the commencement of the winding-up received moneys from the public for entrance into the theatre, held, that the execution was ‘put in force’ from the date of the receipt of the moneys, and that the execution was void in respect of moneys received after the commencement of winding-up, and that the moneys thus received should be paid to the liquidator. *Opera, Lim.*, 1880, W.N. 2 Ch. 154=62 L.T. 859. U

f) In *Exhall Mining Co.*, 4 D.J. and S. 377, it was decided that S. 211 of the English Companies Act corresponding to S. 212 of the Indian Act is to be read with and controlled by S. 140 and 142 of the English Act (corresponding to the present section and S. 136, *infra*), and that their joint effect was to put the creditor who desired to proceed to execution after the winding-up order to the necessity of coming to the Court and asking for leave; whether he should be allowed to proceed or not was for the discretion of the Court. V

1.—“Restrain further proceedings....against the Company”—(Continued).

N.B.—Commenting on this case, Buckley says “it is difficult, no doubt to see why the clear and precise provisions of S. 211 (English Act) should be read as if a distress were a proceeding within S. 142 (English Act), but the Court is bound by the decision, and the many subsequent cases which have followed it.” Buckley, 9th Ed., p. 329.

(7) Priority of Crown debts.

The provisions of the Act do not affect the rights of the Crown whether by way of distress or priority of payment. The Court cannot prevent the Crown from proceeding against a Company in liquidation or from levying execution upon its property. *English Joint Stock Bank*, 1866, W.N. 199. *Henley & Co.*, 9 Ch. Div. 469=26 W.R. 885; *West London Commercial Bank*, 36 Ch. D. 364. See, also, *Oriental Bank Company*. *E.P. Crown*, 28 Ch. D. 643; *E.P. Postmaster-General*, 30 Ch. D. 595. But see *Regent United Service Stores*, 38 L.T. 130, *contra*. Y-1

(8) Order under the section, discretionary.

Under this section the Court has a complete discretion to stay actions and proceedings against a Company in liquidation at any time before a winding-up order is made. See 18 B. 65; see, also, *In re Great Ship Co., Parry's case*, 4 D.J. & S. 63=33 L.J. Ch. 245=3 N.R. 181=12 W.R. 139=10 Jur. (N.S.) 3; *Smith, Fleming & Co.'s case*, 1 Ch. 538, 545. W

(9) Discretion how exercised.

(a) As the main object of the Act is to collect and distribute the assets among the general body of creditors *pari passu*, in exercising the discretion the Court is bound to look at the legal rights of the parties, and at the interests not of one class of creditors only, but of each particular class of creditors who may be affected by the decision at which it shall arrive. It is the duty of the Court to hold an even hand between the interests of all the parties. See Turner L.J. *In re Great Ship Co., Limited, Parry's case*, 1863; DeG. J. & S.M. 63=33 L.J. (Ch.) 245=3 N.R. 181=12 W.R. 139=10 Jur. (N.S.) 3. See, also, *Smith, Fleming & Co.'s case*, 1 Ch. 538, 545. X

(b) In considering the question as to the exercise of its discretion in granting an injunction, the Court is bound to see what would be its duty or might probably be its duty if the order to wind-up had been actually made, and an application had been made by the creditor under S. 136, to continue the suit or proceeding. *Ibid*. Y

(10) Undue delay in applying for stay—Effect of.

If the application for stay of an action is not made promptly after the presentation of the petition, and the plaintiff obtains a decree and proceeds to execution, an order to stay the execution will be made only on the term of payment into Court. *Everingham v. Co-operative Beer Co.*, 1880, W.N. 99. Z

(11) Stay of executions.

An execution is a proceeding within this section and S. 136, *infra*, and can be restrained by the Court. A

1.—“*Restrain further proceedings....against the Company*”—(Continued).

(12) Execution put in force before commencement of winding-up.

- (a) If before the presentation of the winding-up petition a creditor has obtained judgment, and the property of the Company has been attached and seized in execution, he becomes a secured creditor and the Court will not, in the absence of special circumstances, restrain the sale. *Great Ship Co., Parry's case*, 4 De.J. and S. 63=53 L.J. (Ch.) 245=3 N.R. 181=12 W.R. 139=10 Jur. (N.S.) 3; *Withernsea Brickworks*, 17 Ch. D. 337. **B**

N.B.—Where the decree in a suit had been already executed by the attachment of the property of the defendants, *held*, although the sum decreed may not have been realized by a sale, there was no longer a suit or action to be stayed within the meaning of S. 72 of Act XIX of 1857. 3 Bom. O. C. 20.

- (b) Again, if execution is only prevented by resistance made to the officers entrusted with execution, the Court will not grant an injunction under this section. *London Cotton Co.*, 2 Eq. 53; see, also, *Dublin Exhibition Palace, etc. Co.*, I.R. 2 Eq. 153. **C**

- (c) But an injunction will be granted where a forced sale under execution would be ruinous to the Company and their creditors. In such case, however, the creditor would be given a first charge on the property for his debts and costs, or the same rights would be reserved to him over the proceeds of the property sold as he would have had if the property had been sold. See *Hill Pottery Co.*, 1 Eq. 649; see, also, *Dublin Exhibition Palace, etc. Co.*, I.R. 2 Eq. 153; *Plas-yn-Mhowys Coal Co.*, 4 Eq. 689; *Railway Steel Co.*, *Re Taylor* 8 Ch. D. 183; *Pen-Allt Silver Lead Mining Co.*, 15 Sol. J. 714. **D**

N.B.—Buckley questions the authority of these cases and says it does not appear what right the Company has to special indulgence. See Buckley, 9th Ed., p. 331, and also *Milwood Colliery Co.*, 24 W.R. 593.

(13) Stay of execution when possession not taken before winding-up.

- (a) If possession is not taken before the presentation of the petition, the creditor is not a secured creditor and the Court, having regard to the object of winding-up proceedings, viz., an equal distribution of assets among all creditors, will not, in the absence of special circumstances in favour of the judgment-creditor, allow proceedings in execution to continue. See *Smith Fleming & Co.'s case*, 1 Ch. 533, 545; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250; *London and Devon Biscuit Co.*, 12 Eq. 190; *Dimson's Estate Fire clay Co.*, 19 Eq. 202; *Railway Steel Co.*, *Re Williams*, 8 Ch. D. 183. **E**

- (b) But the rule in this respect is only a general one which has been adopted in the discretion of the Court and may in a proper case be disregarded. The Act makes no distinction whether possession has or has not been taken before the commencement of winding-up. See Buckley, 9th Ed., p. 331. **F**

- (c) Thus, *In re Bastow & Co.*, 4 Eq. 681, execution was allowed to proceed though possession was not taken before the presentation of the petition. The special circumstances of the case were (1) the petition was presented by the Company so that the winding-up was for their own convenience; (2) the creditor had no fair notice of the petition; (3) the assets were sufficient to pay all creditors in full. **F-1**

I.—“*Restrain further proceedings....against the Company*”—(Continued).

(d) So also, where, owing to vexatious delay on the part of the Company in an action a creditor was not able to levy execution until after the presentation of the petition, he was not restrained. *Imperial Steam Co.*, 37 L.J. Ch. 517=16 W.R. 689=18 L.T. 390. **F-2**

(e) Similarly, a creditor who has been induced by the Company to give them an indulgence by forbearing to proceed to judgment or execution will not be restrained from prosecuting his claim against the Company. *Richards & Co.*, 11 Ch. D. 676; *Doubted in Iron Colliery Co.*, 20 Ch. D. 442. **G**

(f) Where there was delay in issuing execution owing to the Company's application for time, the creditor was allowed to proceed execution. *Railway Steel Co., Re Taylor*, 8 Ch. D. 188; *Doubted in Iron Colliery Co.*, 20 Ch. D. 442. **H**

N.B.—Having regard to *Iron Colliery Company*, 20 Ch. D. 442, these cases are of doubtful authority. See *Universal Disinfector Co.*, 20 Eq. 162.

N.B.—“If these cases can be supported, it must be, it is conceived, upon the particular circumstances which went to show that the other creditors would not be injured. For, there seems to be no principle in saying that the fund available for payment of the other creditors is to be diminished because the Company delay or deceive the judgment-creditor.”

Quaere.—Whether indulgence given at the request of the Company or delay caused by the Company vexatiously, or even by false pretence, is any ground for giving leave to proceed with an execution. *Buckley*, 9th Ed., p. 332; see, also, *Iron Colliery Co.*, 20 Ch. D. 442; *Witherns Brickworks*, 16 Ch. D. 337, 339; *Therese & Co.*, 1879, W.N. 31. **I**

(14) *Garnishee orders—Effect of service.*

(a) As regards garnishee orders the service of the order *nisi* on the garnishee is equivalent to taking possession in execution, so that if the order is served before the commencement of winding-up the judgment-creditor becomes a secured creditor. See *National United Investment Corp.*, 1901, 2 Ch. 950. See, also, *United English and Scottish Insur. Co., E. P. Hawkins*, 3 Ch 787=5 Eq. 300. **J**

(b) But if the order *nisi* though obtained is not served before the commencement of winding-up, the judgment creditor is not a secured creditor, and will after the commencement of winding-up be restrained from enforcing the order against the garnishee. *Stanhope Co.*, 11 Ch. D. 160; *Cf. Hamer v. Giles*, 11 Ch. D. 942; *E.P. Nelson*, 14 Ch. D. 41, 45, 46. **K**

N.B.—In the case of a garnishee order the judgment-creditor puts in his own execution as a landlord does in distraining for rent. *Buckley*, 9th Ed., p. 333.

(15) *Appointment of a receiver by way of equitable execution.*

The appointment, at the instance of a judgment-creditor before the commencement of the winding-up of a receiver of moneys in respect of the judgment-debtor's interest in a ship, would not constitute the judgment-creditor a secured creditor if no order has been made for payment of these moneys to the judgment-creditor. *Groshov v. Lyndhurst Ship Co.*, 1897 2 Ch. 154. **L**

1.—“*Restrain further proceedings . . . against the Company*”—(Continued).

(16) Execution for costs incurred in liquidation.

The expenses of liquidation, such as costs incurred by the Company in unsuccessfully bringing or defending an action for the benefit of the estate, should be paid in full out of the assets and execution for them will not be restrained. See *Madrid Bank v. Pelly*, 7 Eq. 442; see, also, *E. P. Livick*, 5 Eq. 69; *E. P. Smith*, 3 Ch. 125; *London Drapery Stores*, 1898, 2 Ch 684; *Bailey and Leetham's case* 8 Eq. 94. M

(17) Execution after winding-up order.

- (a) After making of a winding-up order the Court cannot issue or proceed with or put in force an execution without the leave of the Court. See *Ss. 142, 212, infra*. N
- (b) There is no English case in which leave to do any of these things has been granted after making the winding-up order. See *Buckley*, 9th Ed., p. 334. O
- (c) It is extremely doubtful if leave would ever be given to issue or levy execution in respect of a debt incurred before the winding-up, if execution has not been issued before the winding-up order is made. See *Universal Disinfecter Co.*, 20 Eq. 162, cited in *Buckley*, 9th Ed., p. 334; see, also, *Emden's winding-up of the Companies*, 8 Ed., p. 130. P
- (d) But execution or distress may be allowed after the winding-up order, in respect of a debt incurred after the order and for the benefit of the winding-up; e.g., distress for rent of premises which the liquidators occupy for the convenience of the winding-up, and execution or its equivalent, viz., payment in full, out of assets in respect of costs and debts incurred by liquidators in the liquidation for the benefit of the estate. See *Buckley*, 9th Ed., p. 324; see, also, *E. P. Livick*, 5 Eq. 69; *Madrid Bank v. Pelly*, 7 Eq. 442; *E. P. Smith*, 3 Ch. 125. Q

(18) Distress for rent.

- (a) A—is a proceeding within this section and S. 136, *infra*, and can be restrained by the Court after the commencement of winding-up. See *Traders North Staffordshire Co.*, 19 Eq. 60. R
- (b) Like other proceedings, it is not absolutely void under S. 212 but it is subject to the discretion of the Court by virtue of this section and S. 136, *infra*. See *Buckley*, 9th Ed., p. 334. S
- (c) Subject to the exception mentioned in S. 212 *infra*, the general rule of distress that a party entitled to rent in arrear may distrain in the premises out of which it issues, applies to Companies. See *Evans and Cooper*, p. 230. T

(19) Distress levied before commencement of winding-up.

- (a) If a distress has been levied by a landlord before the commencement of winding-up though not then completed by sale, the landlord becomes a secured creditor, the Court will not, in the absence of special circumstances, restrain the sale, after the commencement of winding-up unless the liquidator pass the debt. *Roundwood Colliery Company*, 1897, 1 Ch. 373. U
- (b) Where a Company is wound up voluntarily in pursuance of a special resolution, it is not a sufficient ground for a stay order, that the distress was levied after the passing of the first resolution and on the eve of the confirmatory resolution. (*Ibid.*) Y

1.—“*Restrain further proceedings....against the Company*”—(Continued).

(20) Distress levied after winding-up for rent accrued before winding-up.

- (a) A distress for rent accrued due before the commencement of winding-up will not be allowed if the rent is provable in the winding-up. *Coal Consumer's Association*, 4 Ch. D. 625; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250, 256; *North Yorkshire Iron Co.*, 7 Ch. D. 661; *Bridgewater Engineering Co.*, 12 Ch. D. 181; *South Kensington Stores*, 17 Ch. D. 181; *Trader's North Staffordshire Co.*, 19 Eq. 60. W
- (b) This is so even where the Company is insolvent. *Re Coal Consumer's Association*, (1876) 4 Ch. D. 625; *Re Bridgewater Engineering Co.*, (1879) 2 Ch. D. 181; see Halsbury's Laws of England, p. 536, note (c). X

(21) Rent accrued before winding-up—Landlord when can levy distress.

- (a) If the lessor having a right of re-entry applies to the Court for leave to re-enter, he can obtain payment in full, for, if the Company seeks to retain the property, it can do so after satisfying the legal obligation to pay the whole rent in full. *Silkstone v. Dodworth Co.*, 17 Ch. D. 158; *General Share Co. v. Wesley Brick Co.*, 20 Ch. D. 260. Y

N.B.—1. Though the proper remedy of a landlord who is entitled to re-enter for non-payment of rent is to *sue* for possession, still, if he applies for possession and the claim is one against which the liquidator would have no defence in the winding-up, the Court will order the liquidator to deliver possession and will not put the applicant to the expense of bringing an action. *General Share and Trust Co. v. Wesley Brick and Pottery Co.*, (1882) 20 Ch. D. 260, C.A.; *Re New North Staffordshire Coal and Iron Co.*, (1884) W.N. 106; see, also, *Re Strand Hotel Co.*, (1868) W.N. 2. Z

2. The landlord cannot be prevented from enforcing his right of re-entry merely to enable the Company to gain time for a re-construction. *General Share Co. v. Wesley Brick Co.*, 20 Ch. D. 260. A
3. But the lessor cannot get payment in full if the lease is at or above the rack rent and the lessor does not seek to re-enter. *South Kensington Stores*, 17 Ch. D. 161. B
4. Where under the terms of a lease the lessor has a right of re-entry “if the Company shall be wound up” this means only “when the Company commences to be wound up” and not “when the Company is finally wound up.” In such a case on the making of a winding-up order the lessor is entitled if he applies for it, to an order for delivery of possession and cannot be put to the necessity of bringing an action. *General Share Co. v. Wesley Brick Co.*, 20 Ch. D. 260. C
5. This is so even where the Company is wound up for the purpose of re-construction only. *Fryer v. Ewart*, (1902) A.C. 187; *Horsey Estate, Ltd. v. Steiger*, (1899) 2 Q.B. 79. D
6. In this case the Court of appeal did not allow the lessor the costs of his application in the lower Court. But Buckley asks “why should the lessor bear his own costs of an application in which he succeeded, and which was rendered necessary by the Company's liquidation?” See Buckley, 9th Ed., p. 338. E

- (b) If the goods upon which it is sought to distrain, though they may belong to the Company, are subject to a charge, e.g., to debenture-holders, for

1.—“Restrain further proceedings... against the Company”—(Continued).

more than their value, they are not considered as the property of the Company, and the lessor will be allowed to distrain for all rent whensoever accrued due. *New City Club Ex. p. Russell*, 34 Ch. D. 646; *Cumberland Union Bank v. Maryport Iron Co.*, (1892) 1 Ch 415; *Harper's Cycle Filling Co.*, (1900) 2 Ch. 731; *G.F. Wilmott v. London Celluloid Co.*, 31 Ch. D. 425=34 Ch. D. 147=55 L.T. 696= 35 W.R. 145=56 L.J. Ch. 89. F

N.B.—1. The fact that a receiver has been appointed will make no difference. Nor can the debenture-holders prevent the distress by offering to give up their security. *Harper's Cycle Co.*, (1900) 2 Ch. 731; *New City Club Co.*, *E.P. Purcell*, 34 Ch. D. 646; *G. F. Cannock and Rugeby, Colliery Co.*, *E. P. Harrison*, 28 Ch. D. 863. G

2. Though the language of S. 212, *infra*, is general and forbids distress against Company's effects and goods, yet, that section does not, so to speak, run with the effects so as to attach to them wherever they may be found but applies only where the distress is upon the effects as effects of the Company. *E. P. Heaven*, 6 Ch. 462; *Traders North Staffordshire Co.*, 19 Eq. 60; *Exhall Mining Co.*, 12 W.R. 727=4 D. J. and S. 377=10 Jur. (N.S.) 576=4 N.R. 127=13 W.R. 219=11 L.T. 581=34 L.J. (Ch.) 123. H

(c) If there is no privity between the lessor and the Company, as where the Company are only under-lessees or equitable owners of the lease, the lease being vested in trustees for the Company, the lessor is not a creditor of the Company and cannot prove in the winding-up. But he has a right of distress against the legal tenant, for rent whenever accrued due, and may distrain upon the goods found upon the premises though such goods happen to be the goods of the Company. *Lundy Granite Co.*, *E.P. Heaven*, 6 Ch. 462; *Traders North Staffordshire Co.*, 19 Eq. 60; *Regent United Service Stores*, 8 Ch. Div. 616; *Exhall Mining Co.*, 4 De. G. J. & S. 377. I

N.B.—1. S. 212, *infra*, does not render void a distress by a person who distrains not as a creditor of the Company but as stranger against his debtor upon the goods which the debtor may have in his possession, though such goods happen to be the goods of the Company. *E.P. Heaven*, 6 Ch. 462. J

2. The Court cannot bring the case within the scope of that section by giving the lessor permission to prove in the winding-up. *Regent United Service Stores*, 8 Ch. D. 616. K

3. But, if the lessor accepts a collateral security for the rent, from the Company, he becomes a creditor of the Company and is entitled to prove for the rent in the winding-up, and will not therefore be allowed to distrain. *New City Club, E.P. Purcell*, 34 Ch. D. 646; *Harper's Cycle Co.*, (1900) 2 Ch. 731. L

4. The decision in *E.P. Clemence*, 23 Ch. D. 154 that the acceptance of a collateral security would not affect the right of distress, was doubted and not followed in *New City Club, E.P. Purcell*, 34 Ch. D. 646. See also *Harper's Cycle Co.*, (1900) 2 Ch. 731. M

5. Where persons in whom a lease is vested in trust for the Company make payments of rent, their right to indemnity out of the trust property is a first charge upon it. *Exhall Coal Co., Re Buckley*, 35 Beav. 449. N

I.—“Restrain further proceedings...against the Company”—(Continued).

(22) Rent accrued after commencement of winding-up distress.

(a) As for rent accrued due after winding-up, the landlord will be allowed payment in full, or will be permitted to distrain, only if the liquidator retains possession of the premises for the benefit and convenience of the winding-up, but not otherwise. *North Yorkshire Iron Co.*, 7 Ch. D. 661; *South Kensington Stores*, 17 Ch. D. 161; *Coal Consumer's Association*, 4 Ch. D. 625; *Lundy Granite Co.*, 6 Ch. 462; *Higginshaw Mills*, (1896) 2 Ch. 544, 550, 561; *Oak Pits Colliery Co.*, 21 Ch. D. 322; *House and Land Investment Trust*, 42 W.R. 572; *Progress Assurance Co.*, 9 Eq. 370; *Kensington Royal Marine Hotel*, 15 W. R. 978. O

(b) If the company retains possession of the property for its own purposes and with a view to realize the property to better advantage so that the lessor is not able to obtain possession of it, the Court will see that he receives the full value of the property and will allow him to distrain upon the goods of the Company or allow him payment in full for rent accrued due since the winding-up. *E. P. Heaven*, 6 Ch. 462, cited in Buckley, 9th Ed., p. 336. P

N.B.—In such case the rent will be regarded as an obligation incurred for the benefit of the estate. *North Yorkshire Iron Co.*, 7 Ch. D. 661; *Higginshaw Mills*, (1896) 2 Ch. 544, 550, 551. Q

(c) If necessary the rent will be apportioned as on the date of presentation of the winding-up petition. See *South Kensington Stores*, 17 Ch. D. 161. R

(d) A distress or payment in full will not be allowed where possession is retained by the liquidator with the lessor's consent, for the joint benefit of all the parties concerned. The lessor can in such case only prove for the amount of the rent. *Re Progress Assurance Co., E.P. Liverpool Exchange Co.*, (1870) L.R. 9 Eq. 370; *Re Bridgewater Engineering Co.*, (1879) 12 Ch. D. 181; *Re Lancashire Cotton Spinning Co., E.P. Carnelly*, (1887) 35 Ch. D. 656, C. A.; *Re Higginshaw Mills*, (1896) 2 Ch. 544 C. A.; *Shackell & Co. v. Chorlton & Sons*, (1895) 1 Ch. 378. S

(e) Nor will it be allowed where possession is retained without a view to his own benefit. *North Yorkshire Iron Co.*, (1878) 7 Ch. D. 661; *Re South Kensington Co-operative Stores*, (1881) 17 Ch. D. 161; *Re Brown Baley and Dixon, E.P. Roberts and Wright*, (1881) 18 Ch. D. 649; *Re Oak Pits Colliery Co.*, (1882) 21 Ch. D. 322 C. A.; *Re House, Re House and Land Investment Trust E. P. Smith*, (1894) 42 W.R. 572. T

(f) The mere fact that the liquidator left the Company's plant and machinery where he found them, that he had them valued for sale and that he took no steps to surrender the Company's interest to the landlord, will not avail him to obtain payment in full. *Oak Pits Colliery Co.*, 21 Ch. D. 322. U

(g) Nor is it enough to show that the liquidator has done nothing but obtain from trying to get rid of the property, or that he has derived an indirect advantage from the demised property. (*Ibid.*) Y

1.—“*Restrain further proceedings . . . against the Company*”—(Continued).

(23) Possession for the convenience of winding-up, test of.

- (a) In order to ascertain whether the possession retained by the liquidator is such as to give the landlord a right to payment in full it appears the test is not whether the possession has been retained for the purpose of carrying on the business so as to give benefit for the estate, nor whether the landlord has been kept out of possession without any power of finding his own remedy by re-entry, but whether the company has in fact wished to retain possession for its own benefit whether by present working or by disposing of the property to better advantage as a going concern. *Buckley*, 9th Ed., p. 387; see, also, *North Yorkshire Iron Co.*, 7 Ch. D. 661; *E.P. Heaven*, 6 Ch. D. 462; *Coal Consumer's Association*, 4 Ch. D. 625; *Oak Pits Colliery Co.*, 21 Ch. D. 322. W

N.B.—Rent in respect of land retained by the Company “for the convenience of the winding-up” is looked upon as part of the costs incurred in the winding-up, and under S. 158 the Court may order the payment of such cost in such order of priority as it thinks fit.

N.B.—For costs of voluntary liquidation, see S. 188, *infra*.

(24) Landlord seeking distress—*Onus of proving special circumstances.*

Where the landlord applies for permission to levy distress for rent, he is bound to show either (1) that there is some special equity which renders it unjust for S. 212 being enforced against him; or (2) that the rent ought to be paid as part of the costs of winding-up. *Lancashire Cotton Co.*, 35 Ch. D. 556. X

(25) Distress by mortgagee.

- (a) A mortgagee having a power of distress over property not otherwise included in the security “as a landlord might distrain for rent” will not be allowed to distrain for arrears of rent accrued due before the winding up. The case is governed by the same principles as are applicable to the case of a lessor seeking distress for rent. *Re Brown Bayley and Dixon*, *E.P. Roberts*, 18 Ch. D. 649. Y

- (b) But as a mortgagee has the benefit of his security he cannot get leave to distrain so easily as a landlord with a power of distress. See *Higginshaw Mills Co.*, (1896) 2 Ch. 545; *Lancashire Cotton Spinning Co.*, *E.P. Carnelly*, 35 Ch. D. 656; *Re Brown, Bayley and Dixon Roberts*, 18 Ch. D. 649. Z

- (c) Thus where the liquidator took possession without objection on the mortgagee's part, and the liquidator kept the property in working order so as to prevent deterioration and to enable the same to be sold as a going concern the Court held that the liquidator's possession was as much to the benefit of the mortgagee as to the Company and refused leave to distrain for interest accrued due since the date when the liquidator entered into possession. *Higginshaw Mills*, (1896) 2 Ch. 544. A

(26) Liquidator's liability for rent—Nature of.

- (a) A liquidator who takes or retains possession of property held by a Company does not thereby incur a personal liability for the rent with only a

I.—“*Restrain further proceedings....against the Company*”—(Concluded).

right of indemnity against the assets, for the Company's property does not vest in him, and the occupation is not the occupation of the liquidator but of the Company. *Wearmouth Crown Glass Co.*, 19 Ch. D. 640. B

- (b) Even a vesting order under S. 247, in the case of an unregistered Company would not make the liquidator personally liable, for, such order as the effect of vesting the property in the liquidator only in his official character, but not in his personal character. *Graham v. Edge*, 20 Q. B. Div. 683; S. C. *Ibid.*, 538. C

- (c) The case is different from that of the assignee in Insolvency, in (1) that the property does not vest in the liquidator, and (2) he has no right of disclaiming the lease. See *Buckley*, 9th Ed., p. 337 and the case there cited. D

- (d) His case is also different from that of an executor. An executor is an assignee of the lease and by taking possession he becomes personally liable for subsequent rent up to the letting value of the holding. *Strathmore v. Vane Norcliffe's Claim*, 37 Ch. D. 128. E

(27) *Distress for rates.*

- (a) A distress for rates put in force before the commencement of winding-up will not be restrained unless the liquidator pays the rates. See *Dry Docks Corporation of London*, (1888) 39 Ch. D. 306. F

- (b) Under S. 200-A, *infra*, all revenue, taxes, cesses and rates payable to the Government or a local authority, due from the Company at the date of the commencement and having become due and payable within twelve months next before that date, are, along with certain salaries and wages of clerks and servants of the Company, to be paid in priority to other debts. G

- (c) Where S. 200-A does not apply the whole of a rate assessed before winding-up for a period in the course of which winding-up has commenced is a debt of the Company in the winding-up and is provable. The rate cannot be apportioned and payment in full obtained of so much of the apportioned part as is attributable to the period after winding-up commenced. *Buckley*, 9th Ed., p. 338. H

- (d) But rates made after the commencement of winding-up should be paid in full if the liquidator retains beneficial occupation of the premises for the convenience of the winding-up or leave will be given to distrain for them. See *Blazer Fire Lighter, Ltd.*, (1895) 1 Ch. 402; *National Arms etc., Co.*, 28 Ch. D. 474; *West Harpool Iron Co.*, 34 L.T. 568; *Wearmouth Crown Glass Co.*, 19 Ch. D. 640; *International Marine Hydrographic Co.*, 28 Ch. D. 470. I

(28) *Order for stay of proceedings in another Court, when takes effect.*

Where an order is made by a Court in which a Company is being wound up, for the stay of proceedings against it in another Court, and application is made to the Court in which the proceedings are pending to execute the order, the order can be given effect to only from the date of the application. 3 Bom. O.C. 20. J

2.—“Upon such terms as the Court thinks fit.”

Security may be required before stay is granted.

- (a) Where on the application of the Company the Court stays further proceedings in a suit pending against it, the Court may require the Company to give the usual undertaking as to damages. 18 B. 65. **K**
- (b) The practice of the English Courts is where a winding-up petition is about to be heard, to restrain actions by creditors against the Company on motion *ex parte*, the applicant giving the usual undertaking as to damages. See *London and Suburban Bank*, 19 W.R. 950 = 25 L.T. 23. See, also, *Masback v. Anderson & Co.*, (1877) W.N. 252 = 26 W.R. 100 = 37 L.T. 440. **L**

N.B.—Where proceedings are stayed, the Court would generally require the liquidator to admit the creditor to prove for the amount of his claim in the winding-up. See *Re Poole Fire Brick and Blue Clay Co.*, (1873) 17 Eq. 268. See, also, 30 M. 533. **M**

3.—“The Court may also...of the Company.”

(1) Provisional liquidators, appointment of, under English Law.

As to when a provisional liquidator may be appointed under the English Companies (consolidation) Act, and as to the appointment of the Official Receiver as provisional liquidator, see notes under the head ‘general’, *supra*. **N**

(2) Appointment of voluntary liquidators as provisional liquidators.

Where a supervision order is superseded by a compulsory order, the Court may, by the last mentioned or any other subsequent order, appoint the person who is then liquidator as a provisional liquidator either with or without any other person. See S. 196, *infra*. **O**

(3) Provisional liquidator's, appointment contingent.

The appointment of a provisional liquidator is not only provisional but also contingent on an order for compulsory winding-up being made; if no such order is made, the appointment would not interfere with the rights of third parties. *Dry Docks Corpn.*, 39 Ch. Div. 306, 314. **P**

(4) Provisional liquidators, when generally appointed.

According to the practice of the English Courts, a provisional liquidator would not generally be appointed before the hearing of the petition unless the Company is insolvent and the assets need immediate protection, or the Company itself is the petitioner, or consents to the application, or the petition is unopposed. See *Hammersmith Town Hall Co.*, 6 Ch. D. 112; *Railway Finance Co.*, 14 W.R. 754 = 14 L.T. 507; *Rockall Fishery Co.*, 11 W.R. 84; *Clifoden Benefit Building Society*, 3 Ch. 462; *Bread Supply Association*, (1890) W.N. 210; *Emerson's case*, 2 Eq. 231; *West Worthing Waterworks Co.*, 18 L.T. 849. **Q**

(5) Restriction of the powers of provisional liquidator.

- (a) Where a liquidator is provisionally appointed by the Court, the Court may limit and restrict his powers by the order appointing him. See S. 145, *infra*. **R**
- (b) A provisional liquidator may be appointed after the winding-up order for a limited purpose. See *Langham Skating Rink Co.*, 6 Ch. D. 102. **S**

3.—“The Court may also... of the Company” —(Concluded).

(6) Security from provisional liquidator.

(a) A provisional liquidator should generally give security to this satisfaction of the Court. See *Mercantile Bank of Australia* (1892), 2 Ch. 204. **T**

(b) But a provisional liquidator may be appointed for a limited purpose without security. *Langham Skating Rink Co.*, 16 Ch. D. 102. **U**

(7) Appointment of provisional liquidators without Company's consent.

In urgent cases a provisional liquidator may be appointed without the Company's consent, on his undertaking to give security. *Hammersmith Town Hall Co.*, 6 Ch. D. 112. **Y**

(8) Ex parte appointment of provisional liquidators.

The Court has power to appoint a provisional liquidator without the Company being served. But an *ex parte* appointment will be made only under most exceptional circumstances. See *Mercantile Bank of Australia*, (1892) 2 Ch. 204. **W**

(9) Provisional liquidator entitled to costs of appearance.

A provisional liquidator is not entitled to appear on the hearing of the petition, and if he appears, he will not be given his costs of appearance. *General International Agency Co.*, 36 Beav. 1=13 W.R. 363=34 L. J. (Ch.) 337=5 N.R. 265. **X**

135. Upon hearing the petition ¹, the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make any interim order or any other order that it deems just ².

Course to be pursued by Court on hearing petition.

Corresponding English Law.

This section corresponds to the first part of sub-S. 1 of S. 141 of the English Companies (Consolidation) Act of 1908. After the words 'that it deems just' the English Act contains the words "but the Court shall not refuse to make a winding-up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets, or that the Company has no assets."

These words recognize and give effect to the decision in *Crigglestone Coal Co.*, (1906) Ch. 2 327.

Sub-S. 2 of S. 142 of the English Act provides that where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default. **Y**

1.—“Upon hearing the petition.”

(1) Who may be heard on the petition.

(a) The only persons that are entitled to be heard on a petition are the Company, its creditors and contributories. *Bradford Navigation Co.*, 9 Eq. 80=10 Eq. 331. **Z**

(b) A secured creditor is entitled to appear on the petition without giving up his security. He is not bound to elect whether he will give up or retain his security until the time for proof arrives. *Carmarthen Coal Co.*, (1875) W.N. 243=45 L.J. (Ch.) 200. **A**

1.—“Upon hearing the petition”—(Concluded).

- (c) Persons who have become share-holders by transfer after the presentation of the petition are also entitled to be heard. *Tumacacori Mining Co.*, 17 Eq. 534, 537. **B**
- (d) If none of the creditors or contributories gives notice of intention to appear, the petition may, if the Company consents, be treated as unopposed at its first call. *Re Inman*, (1891) W.N. 202. **C**
- (e) Persons other than creditors or contributories cannot insist that they shall be heard. But the Court may in its discretion hear any such persons in order to learn what public grounds there are in favour of or in opposition of the winding up. *Bradford Navigation Co.*, 9 Eq. 80, 10 Eq. 331. **D**

N.B.—They can be heard only as *amicie curiae*, and have no right of appeal. (*Ibid.*)

(2) Amendment of petition.

A petition may by leave of the Court be amended at the hearing. *Queen's Benefit Building Society*, 6 Ch. 818; *White Star Co.*, 43 L.T. 815. **E**

2.—“The Court may....just.”

(1) Adjournment of petition.

- (a) As a winding-up order relates back to the presentation of the petition, and affects acts done in the interval, an adjournment will not generally be granted except on some special grounds. *Metropolitan Railway Warehouse Co.*, 15 W.R. 1121; 17 L.T. 108; *Metropolitan Saloon Omnibus Co.*, *E. P. Hawkins*, 28 L.J. (Ch.) 890; *Albion Bank*, (1866) W.N. 388; 15 W.R. 148; 15 L.T. 346. **F**
- (b) But, where the majority of share-holders desire an adjournment to enable the Company to make arrangements to pay its debts and if it appears that the petitioner (being a creditor) would have better chances of being paid under the proposed arrangement than he would under a winding up order, an adjournment may be given to enable the proposed arrangement to be carried into effect. *Re Brighton Hotel Co.*, (1868) L.R. 6 Eq. 389. **G**
- (c) Thus, an adjournment of four weeks was given where it appeared that the share-holders were getting up a subscription to pay off the immediate debts and were going to appoint new directors and cut down the expenses. (*Ibid.*) **H**
- (d) The Court may adjourn the petition also at the instance of a majority of the creditors, when there is a reasonable hope of an arrangement being made for payment of the debts of the Company. *Western of Canada Oil etc. Co.*, 17 Eq. 1; *Great Western Coal Co.*, 21 Ch. D. 769; *St. Thoms Dock Co.*, 2 C. D. 116. **I**
- (e) Where the Court is of opinion that a winding-up order will be useless if there are no assets, it may direct an inquiry as to assets, and pending the inquiry, order the petition to stand over. See *Olathe Silver Mining Co.*, 27 Ch. D. 278. **J**
- (f) Where the petitioner consents to an adjournment the Court may substitute another petitioner who is desirous of prosecuting the petition. **K**
- (g) Where the Court has no power to make a winding-up order it cannot direct an adjournment for the purpose of holding a meeting. *Joint Stock Coal Co.*, 8 Eq. 146. **L**

2.—“The Court may...just”—(Continued).

(2) Dismissal of petition at the wish of majority.

(a) The Court may at the wish of the majority of creditors dismiss the petition on the ground that a winding up order would be useless. *Uruguay Central Ry. Co.*, 11 C.D. 372; *Chapel House Colliery Co.*, 24 Ch. D. 259. **M**

N.B.—As to adjournments and dismissals at the request of the general body of creditors and share-holders, see further under S. 140, *infra*.

(b) An order will generally be made when there are matters which require investigation. *Re Varieties Limited*, (1903) 2 Ch. 235. **N**

(c) The fact that a petitioner has agreed to refer all the matters in dispute to an arbitrator, and the award of the arbitrator has not been taken up is no bar to his obtaining a winding-up order. *Lancashire and Newcastle-upon-Tyne Ry. Co.*, 5 Rail and Can Cases, 632. **O**

(3) Two Companies cannot be wound up by one order.

Two Companies cannot be included in one winding-up order though separate lists of contributories are made for each Company. *Shields Marine Association, E.P. Lee and Moore* 16 W.R. 69 = 17 L.T. 308 = (1867) W. N. 265, 296. **P**

(4) Petition not to be taken out of the list.

A petitioner will not be allowed to take his petition out of the list, even though he undertakes to pay the costs of any persons who may appear. *Re an Insurance Co.*, 33 L.T. 49; *Midwales Hotel Co.*, 17 L.T. 597. **Q**

(5) Withdrawal of the petition.

But when the petition comes on for hearing, he may, subject to the rules as to the substitution of another petitioner, withdraw his petition on payment of costs. *British Electric Street Tramways*, (1903) 1 Ch. 725; *Times Life Assurance Society*, 9 Eq. 332; *Home Association Society*, 12 Eq. 59; *Hereford Waggon Co.*, 17 Eq. 423; *Marlborough Club Co.*, 1 Eq. 216. **R**

N.B.—As to the substitution of a petitioner in case of withdrawal, see 31 C. 106, noted under S. 136. pp. 297 and 298, *supra*.

(6) Costs of petition, Court's discretion as to.

Costs are in the discretion of the Court and cannot be claimed as a matter of right. Costs may be refused if a creditor has appeared only to ask costs, or where the interests of the parties claiming costs are not affected or where their separate appearance is unnecessary. *Hull and County Bank*, 10 Ch.D. 130; *Walkhan United Mines*, (1882) W. N. 134; *Star and Garter Hotel Co.*, 42 L.J. Ch. 374; *City Glass Co.*, (1874) W.N. 116; *Criterion Gold Mining Co.*, 41 Ch. D. 146; *District Bank of London*, 35 Ch. D. 576. See, also, S. 35, Civ. Pro. Code (Act V of 1908). **S**

(7) Costs of petition on withdrawal.

(a) The costs which a petitioner will be required to pay on the withdrawal of his petition before hearing will include the costs of all the creditors and contributories who appear whether they appear to support or to oppose the petition, for the Court has in such a case no means of judging whether the persons who appear to support or persons appearing to oppose are in the right. See *Nacupat Gold Mining Co.*, 28 Ch.D. 65; *Patent Cocoa Fibre Co.*, 1 Ch. D. 617; *British Electric Street Tramways*, (1903) 1 Ch. 725; *North Brazilian Sugar Factories*, (1887) W.N. 3 = 56 L.T. 229. **T**

2.—“*The Court may....just*”—(Continued).

N.B.—Bunickley says that the reasons for a contrary decision *Jablochhoff Electric Light Co.* (1883) W.N. 189=49 L.T. 566=32 W.R. 169, do not seem satisfactory. See Buckley, 9th Ed., p. 323.

(b) The right of creditors and contributories who attend the hearing, to costs, is not affected by the fact that they have notice that the petitioner intends to withdraw the petition. *Hereford Engineering Co.*, 17 Eq. 423. **U**

(c) But they will get only the costs incurred before hearing and the cost of attending. *Marlborough Club Co.*, 1 Eq. 216. **Y**

(d) The Court will generally allow only one set of costs, and not two sets, one to creditors and one to contributories for, separate sets of costs will not be given when the petition is dismissed on its merits, and no more ought to be given when it is withdrawn. See *Per Kay, J. in Criterion Gold Mining Co.*, 41 Ch. D. 146. See, also, *Peckham Tramways Co.*, 57 L.J. Ch. 462. **W**

(e) But, there may be cases in which the Court may, in its discretion, allow separate sets of costs as for instance where the petitioner refuses to give any reason for the withdrawal of his petition. See *North Brazilian Sugar Factories*, (1887) W.N. 3=56 L.T. 229, as explained in *Peckham Tramways Co.*, 57 L.J. Ch. 462. **X**

N.B.—In *re Paper Bottle Co.*, in which the Court following *North Brazilian Sugar Factories*, (1887) W.N. 3 allowed two separate sets of costs. *Peckham Tramways Company* (57 L.J. 461) was not cited. See Buckley, 9th Ed., p. 323.

N.B.—“The real difficulty, however, is that while if the petition is heard there is a winning side and a losing side and the winning side gets one set of costs, it is impossible to do justice on the same lines when no one can say which side would have won.” Buckley, 9th Ed., p. 323.

(f) As the petitioner is liable to pay the costs of the persons who appear, if he withdraws the petition before hearing, it seems he is entitled to require the Company that such costs shall be paid by the Company if they wish to get rid of his petition by paying his debt. If the Company pay the debt without providing for the costs, he is entitled to bring on his petition to get them. See *Flagstaff Co. of Utah*, 20 Eq. 268, cited in Buckley, 9th Ed., p. 323. **Y**

(8) **Costs of petition that is heard, general rules as to.**

(a) The practice of the English Courts is that if the petitioner succeeds, the petitioner and the Company will get their costs out of the estate, and the contributories and the creditors who support the petition will also get one set of costs each between them. If the petition fails the usual order is that the petitioner pays the costs of Company opposing, and also two sets of costs, one to the opposing creditors, and one to the opposing contributories. See *E.P. Baylie*, 2 Eq. 521; *New Gas Co.*, 5 Ch. D. 703; *Anglo Egyptian Navigation Co.*, 8 Eq. 660; *E.P. Nunneley*, 39 L.J. Ch. 297; *Madras Coffee*, 17 W.R. 643; *General Exchange Bank*, 14 L.T. 582; *Hop and Malt Exchange Co.*, (1866) W.N. 222. **Z**

(b) These rules are not inflexible; still, they have been adopted in England for many years, and apply whether the petitioner is a creditor or contributory. See *Albion Bank*, (1866) W.N. 388; *Anglo Egyptian Co.*, 8 Eq. 660; *New Gas Co.*, 5 Ch. D. 703 and other cases cited in Emden's winding-up of Companies, 8th Ed., p. 269. See, also, Buckley, 9th Ed., p. 244. **A**

2.—“The Court may...just”—(Continued).

- (c) Secured creditors can get their costs, though they do not elect to give up their security. *Carmarthen Coal Co.* (1875) W.N. 243 = 45 L.J. Ch. 200. **B**
- (d) Creditors or contributories who support the successful party will not be allowed to share the costs if they are represented by the same solicitor as the party whom they support. *Brighton Marine Palace*, (1897) W. N. 12; *Ibo Investment Trust*, (1904) 1 Ch. 29. **C**
- (e) Nor will they get their costs if they have not given notice of their intention to appear as required by the rules, and have stated therein whether they support or oppose any and if any what order. See *Buckley*, 9th Ed., p. 344. **D**
- (f) If a petition *bona fide* presented by a creditor or contributory is dismissed at the instance of a majority of share-holders who desire to continue the business, the dismissal may be without costs. *Great Northern Copper Mining Co.*, 14 W.R. 705; *Hoobury Bridge Coal Co.*, (1879) W.N. 51. **E**
- (g) But the petitioner will not be given his costs. *Tyneside Buildings Society*, (1885) W.N. 148. **F**
- (h) If a creditor, after an offer made to secure or pay his debt and costs, proceeds with his petition to a hearing, he will not be given costs incurred after such offer, or will be ordered to pay all the costs of the petition incurred since the offer was refused. See *Buckley*, 9th Ed., pp. 345, 346. **G**
- (i) An injunction may be granted to restrain directors from paying themselves out of the assets, costs of a petition presented by themselves, but opposed by a number of the share-holders and a minority of the directors, *Smith v. Duke of Manchester*, 24 Ch. D. 611. **H**
- (j) If a person against whom the petitioner has made a personal charge appears and successfully refutes the charge, the costs of that person must be paid by the petitioner. *Humber Iron Works Co.*, 2 Eq. 15; *Anglo Greek Steam Co.*, 2 Eq. 1. **I**
- (9) Preliminary inquiry, costs of.
- If the petition is contested on some grounds as to which an inquiry is directed, and the result of the inquiry shows that the petitioner was correct, the costs of the inquiry must be borne by those whose opposition was the cause of the inquiry. *Re Bosworthen Mining Co.*, 26 L.J. Ch. 612. **J**
- (10) Petitioner's costs, a charge on the estate.
- (a) As a winding-up order operates in favour of all creditors and contributories (see S. 131, *supra*), where a petitioner succeeds the petitioner's taxed costs including the costs of establishing his debt and of an application to stay an action pending the hearing of the winding-up petition, are a first charge on the estate and must be paid in full in priority to the costs of the liquidator. *Audley Hall Cotton Spinning Co.*, 6 Eq. 245. **K**
- (b) But the costs can be paid only out of the assets of the Company, and cannot be paid out of assets available for payment of debenture holders. *Anglo Austrian Printing Union*, (1895) 2 Ch. 891. **L**
- (c) The rule of priority applies only to costs of the petitioner. Other persons to whom costs might be awarded in the winding-up are not entitled to priority. *Marlborough Club Co.*, *E. P. Percival*, 6 Eq. 519. **M**

2.—“The Court may...just”—(Continued).

(11) Petitioner's costs free from set off.

The costs to which the petitioner is entitled cannot be set off against any call that may become due to the Company from him as a contributory. *General Exchange Bank*, 4 Eq. 138. See, also, *Equestrian Buildings Co.*, 1 Megone 115. N

(12) Costs of provisional liquidator.

A provisional liquidator though served is not entitled to appear, and if he appears, he will not in general be given the costs of his appearance. His position is that of a receiver *pendente lite*. See *General International Agency Co.*, 36 Beav. 1=13 W.R. 363=34 L.J. (Ch.) 837=5 N. R. 265. O

N.B.—As to the liability for costs when a second petition presented when one is already pending, see notes under S. 131, p. 298, *supra*.

(13) Discharge of winding-up order, effect of, as to costs.

Costs under a winding-up order cannot be directed to be paid out of the estate if the order is subsequently discharged as invalid. See *Estates Investment Co.*, 8 Eq. 227; *Padstow Total Loss Assn.*, 20 Ch. D. 137; *Arthur Average Assn.*, 3 Ch. D. 522. P

(14) Costs—priority of, when supervision order made.

Where a supervision order is made on a petition, the costs of the liquidator incurred before the supervision order are to be paid in priority to the costs of the petitioner, and the petitioner's costs are to be paid in priority to the liquidator's costs incurred after the order. *New York Exchange Co.*, (1893) 1 Ch. 371. See, also, *Sanitary Burial Assn.*, (1900) 2 Ch. 289. Q

N.B.—As to the order of payment of costs where the assets are insufficient to satisfy all the liabilities. See S. 155, *infra*.

(15) Appeal against order on petition.

- (a) The order made on a winding-up petition is appealable. *Buckley*, 9th Ed., p. 346. See, also, S. 169, *infra*. R
- (b) The Company, by its directors, may appeal against a winding-up order notwithstanding that a liquidator has been appointed. *Diamond Fuel Co.*, 13 Ch. Div. 400. See, also, *Commercial Bank of South Australia*, 31 S.J. 10. S
- (c) But, in such a case, the Court will order security for costs unless some one who is personally liable for costs is joined. *Diamond Fuel Co.*, 13 Ch. D. 400. T
- (d) Any creditor or contributory may appeal though he is not the petitioner. *Silkstone Fall Colliery Co.*, 1 Ch. Div. 38. U
- (e) But creditors or contributories who did not appear below cannot appeal without special leave. *Securities Insurance Co.*, (1894) 2 Ch. 410; *Padstow Total Loss Assn.*, 20 Ch. D. 137. V
- (f) The Court of Appeal will not hear creditors and contributories in support of the appeal, but it may hear them in opposition and give them costs if they succeed. *New Gas Co.*, 5 Ch. Div. 708. W

2.—“The Court may....just”.—(Concluded).

- (g) If an appeal against a winding-up order, preferred nominally by the Company, but really by the directors is dismissed, the order will be for costs of the respondents to be paid out of the assets, and no order as to the costs of the appellants. If the petition of appeal is merely dismissed with costs, the directors would get their costs from the assets. *National Saving Bank*, 1 Ch. 547; *Diamond Fuel Co.*, 13 Ch. Div. 400. X

- (h) Proceedings taken under a winding-up order will be discharged if the winding-up petition is dismissed on appeal. *E.P. Williamson*, 5 Ch. 309. Y

136. When an order has been made for winding-up a Company under this Act, no suit or other proceeding shall be proceeded with or commenced against the Company except with the leave of the Court¹ and subject to such terms as the Court may impose.

Suits to be stayed after order for winding-up.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 142 of the English Companies (Consolidation) Act, 1908. Z

1.—“When an order....leave of the Court.”

(1) Application of the section.

- (a) The provisions of the section apply to all Companies registered under the Act including those registered under Part VII, *infra*, to Companies formed and registered under the Joint Stock Companies Acts XIX of 1857 and VII of 1860 or either of them, to Companies registered but not formed under the said Acts or either of them and to unregistered Companies under Part VIII, *infra*. See Ss. 221, 222, 240, 242, 243 and 246, *infra*. A

- (b) In the case of a Company registered under Part VII, *infra*, or of an unregistered Company under Part VIII, *infra*, after a winding-up order, proceedings not only against the Company, but also against any contributory in respect of any debt of the Company shall not be commenced or continued except by leave of the Court. See Ss. 242 and 246, *infra*. B

(2) Proceedings against a Company wound up under supervision.

Under S. 195, *infra*, on order for winding-up subject to supervision is, for purposes of staying actions and other proceedings, to be deemed a compulsory order. B-1

(3) Proceedings against a Company in voluntary liquidation.

The passing of a resolution for the voluntary winding-up of a Company does not operate as a stay of actions and proceedings against the Company. But the Court can, under S. 182, *infra*, stay such actions and proceedings on the application of the liquidator or a contributory. See

1.—“When an order....leave of the Court”—(Continued).

Westbury v. Twigg, (1892), 1 Q.B. 77. See, also, *Keynsham Co., 33 Beav. 123*; *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 6 Ch. 643; *Life Ass. of England*, 34 L.J. Ch. 64; *Harrison v. Mortgage Insurance Co.*, 10 T.L.R. 141. **C**

N.B.—For the difference between the stay of proceedings before and after winding-up, see notes to S. 134, *supra*.

(4) Winding-up order, effect of.

(a) Under this section, a winding-up order peremptorily stays all proceedings against the Company until the leave of the Court has been obtained to proceed with them. **C-1**

(b) A winding-up order also operates as a notice of discharge to the servants of the Company except when the business of the Company is continued. See S. 137, *infra*. **D**

(c) The order also puts an end to the power of directors at any rate as to making calls. *Fowler v. Broad's Patent Night Light Gas Co.*, (1898) 1 Ch. 724. **E**

N.B.—After winding up it is only the liquidator who can make calls. (*Ibid.*)

(d) But the directors may appeal in the name of the Company against the winding-up order. *Re Diamond Fuel Co.*, (1879) 13 Ch. D. 400 C.A.F

(e) The winding-up order does not dissolve the corporation. It is only when the affairs of the Company have been completely wound and an order of dissolution is made under S. 159, that the Company is dissolved. **G**

(f) Nor has it the effect of vesting the Company's property in the liquidator. See Halsbury's Laws of England, Vol. V, p. 420. **G-1**

(g) By S. 212, attachments, distresses or executions put in force against the estate or effects of the Company after the commencement of winding-up are void. **G-2**

(5) Proceedings in Company's name after winding-up order.

After a winding-up order the only persons whom the Court can authorize to institute proceedings in the name are the creditors and contributories. *Cape Breton Co. v. Fenn*, 17 Ch. Div. 198. **H**

(6) Proceedings contemplated by the section.

The proceedings which may be restrained or as to which leave to commence or continue may be given must be against the Company or against the liquidator in that capacity, and includes in the case of a Company registered under Part VII, *infra*, an action against a contributory to enforce a debt in that capacity. *Re Onward Building Society*, (1891) 2 Q.B. 563, 483, C.A.; *Re South of France Pottery Works Syndicate*, (1877) 36 L.T. 651. **I**

(7) Proceedings under the section, instances of.

(a) Applications for rectification of the register. *Re Onward Building Society*, (1891) 2 Q.B. 463. **J**

(b) Criminal proceedings as to rates or penalties. *Re Flaint, Coal and Cannel Co.*, (1887) 56 L.J. (Ch.) 232; *Re Britain Medical and General Life Assurance Association*, (1886) 32 Ch. D. 503. **K**

I.—“ When an order....leave of the Court ”—(Continued).

- (c) Sales after the commencement of winding-up under executions previously issued. *Re Perkins Beach Lead Mining Co.*, (1877) 7 Ch. D. 503. **L**
Quare.—“ Whether an action against a liquidator in his official capacity, is within the section.” Buckley, 9th Ed., p. 352.

(8) Proceedings not within the section—Instances.

- (a) Proceedings against a stranger who is a co-defendant with the Company.
Wells v. Estates Investment Co., (1867) 15 W.R. 762. **M**
- (b) Actions against directors in respect of claims against them by contributors. *New Zealand Banking Corporation, E.P. Hankey*, 21 L.T. 481 = (1869) W.N. 216. **N**
- (c) A counter claim put in by the defendant in a suit brought by the Company is in the nature of a defence and is not within the section. *Mersey Steel & Iron Co. v. Naylor Benzon & Co.*, (1882) 9 Q. B. D. 648. **O**
- (d) Execution of a judgment debt due to the Crown, or to the Secretary of State in Council for India. 5 B.H.C.O.C. 23. **P**
- (e) An appeal to the House of Lords, in a case in which the Company was the plaintiff was held not to be within the corresponding section of the English Act. *Humber v. Griffiths*, 85 L.T. 141. **Q**

(9) Leave to commence or proceed, when will be given.

- (a) As a general rule leave to institute or continue an action will be given only where some question arises which cannot satisfactorily be determined in the winding-up, and to determine which an action is necessary. *Wilson v. Natal Investment Co.*, 36 L.J. Ch. 312 = (1867) W.N. 68; *Keynsham Co.*, 33 Beav 123; *Life Assurance of England*, 34, L.J. Ch. 64; *Poole Fire Brick Co.*, 17 Eq. 268. **R**
- (b) Sometimes leave may be granted to proceed with a suit till a particular stage is reached, e.g., until the defence, is delivered, in which case further leave should be obtained to proceed with the suit beyond that stage. *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 6 Ch. 643. **S**
- (c) Leave will be given to proceed with an action as against third parties to which the Company is a necessary party, the plaintiff undertaking that he will not, without the leave of the Court, enforce against the Company, any judgment he may obtain in the action. *Re Rio Grande De Sul Steam Ship Co.*, (1877) 5 Ch. D. 282; *Re London, Bombay, and Mediterranean Bank*, *McEwen v. London, Bombay and Medeterranean Bank*, 15 L.T. 495 = (1866) W.N. 407; 15 W.R. 245; *Re Breach Loading Armoury Co.*, *Hugel v. Carrie*, (1867) W.N. 75; *Re Marine Investment Co.*, (1868) 17 L.T. 535. **T**
- (d) Leave will also be given as a matter of course to continue proceedings for enforcing a mortgage or security upon the Company's property, unless the Company offers to give all that the mortgagee can obtain by his proceedings, or unless he has already obtained the same relief by an order in the winding-up. *Lloyd v. Lloyd & Co.*, 6 Ch. D. 339 and other cases cited in Halsbury's Laws of England, p. 538 and Buckley, 9th Ed., p. 350. **U**
- (e) Where the question can most conveniently be determined only in an action. *Wyley v. Exhall Coal Mining Co.*, (1864) 33 Beav. 538 *Re Contract Corporation E.P.*, *Baileman*, (1866) 15 W.R. 118, 245 C.A.; *Re Peace Joseph & Co.*, (1873) W.N. 127. **Y**

1.—“ When an order....leave of the Court ”—(Continued).

- (f) Or where the suit is for rescission or rectification of the register and commenced by a share-holder before the winding up. *Henderson v. Lacon*, (1887) L.R. 5 Eq. 249; *Hall v. Old Talargoch Lead Mining Co.*, (1876) 3 Ch. D. 749; *Marshall v. Glamorgan Iron and Coal Co.*, (1868) L.R. 7 Eq. 129, 132; *Cocksedge v. Metropolitan Coal Consumers Association, Ltd.*, 432 65 L.T. (1891) C.A. W
- (g) Leave has been given to bring an action of ejectment against the Company. *Strand Hotel Co.*, (1868) W.N. 2, Buckley, p. 81. X
- (h) To proceed with a suit for the specific performance of a contract. *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, (1870) L.R. 11 Eq. 248. Y
- (i) Where an injunction was granted against a Company in a suit brought against it for restraining trespass and for damages, and a winding-up order was then made, a general permission to continue the suit was granted. *Wyley v. The Exhall Coal Mining Co.*, 33 Beav. 539. Z
- (10) Leave to proceed with suit does not include leave to enforce execution of decree therein.

The language of the section shows that proceedings in execution are regarded as distinct from the suit for purposes of the section, and therefore the permission given to proceed with a suit is not authority for proceedings in execution of the decree in the suit authorized. 16 B. 644.A

(11) Appeal against order granting or refusing leave.

- (a) Where the Court in which the winding-up is proceeding, has granted leave to continue an action, the appellate Court will not interfere with the discretion of the lower Court. *Thames Plate Glass Co. v. Land and Sea Telegraph Co.*, 6 Ch. 643. B
- (b) But there are cases in which the Court of Appeal has granted leave when it was refused by the Court below. *Strand Hotel Co.*, (1868) W.N. 2; *St. Cuthbert's Lead Smelting Co.*, 35 Beav. 384; (1866) W.N. 84, 91; *Mc Queen v. London, Bombay etc., Bank*, 15 L.T. 495; (1866) W.N. 407; 15 W.R. 245. C

(12) Effect of winding-up order on leave previously given.

Where leave is given to proceed to execution a suit against a Company in liquidation before the winding-up order is made, the making of the order will not necessarily affect the leave. 2 Ind. Jur. N.S. 123. D

(13) Winding-up order of foreign Court, no bar to proceedings in this country.

A suit may be brought in India against a Company which is being wound up by a Court in England without obtaining the leave of that Court, though the High Court in exercise of its general power may stay such a suit if there are circumstances that would render it proper that the suit, should be stayed. 5 B.H.C.O.C. 83. See, also, 1 Ind. Jur. N.S. 363. E

(14) Winding-up order in India no bar to proceedings in foreign Court.

- (a) Similarly, a suit against a Company that is being wound up in this country may be brought in a foreign Court without obtaining the leave of the Court in this country. Cf. *E.P. Scinde Railway Co.*, 9 Ch. 557, 560. F

N. B.—The provisions of this section and S. 212, *infra*, apply only to the Courts in this country and do not apply to proceedings in foreign Courts. See *Per Mellish, L.J.* in *E.P. Scinde Railway Co.*, 9 Ch. 557, 560.

I.—“When an order... leave of the Court”—(Continued).

- (b) But the section applies to proceedings in this country, though they relate to property situated in a foreign country. *South Eastern Portugal Railway Co.*, 17 W.R. 982; *Wanzer Lim.*, (1891) 1 Ch. 305. H
- (c) The Court can also restrain a person within its jurisdiction from commencing or continuing actions or proceedings, in a foreign Court. *North Carolina Estate Co.*, (1889) W.N. 53=5 T.L.R. 323; *Re Oriental Inland Steam Co.*, *E.P. Scinde Railway Co.*, (1874) 9 Ch. App. 557; *Flack's case*, (1894) 1 Ch. 369; *Re Belfast Ship Owner's Co.*, (1894) 1 I.R. 321 C.A.; *Re Jenkinson and Co.*, (1907) 51 Sol. Jo. 715. I

N.B.—The principle is that the assets are held upon a trust for all parties entitled and are *cesti que trust*, who gets possession of the trust property must be brought in for distribution with the rest. Buckley, 9th Ed., p. 349.

(15) Judgment *in rem* of foreign Court—Effect of.

Where a person has obtained a judgment *in rem* in a foreign Court, against the property of a Company in liquidation, the liquidator cannot sue him to recover from him the amount received by him under the judgment, though he is a British Indian subject domiciled in India. *C.F. Minna Craig Steamship Co. v. Chartered Mercantile Bank of India, London and China*, (1897) 1 Q.B. 460 C.A. J

(16) Stay of proceedings with permission to prove in winding-up.

- (a) Where proceedings are stayed or leave to proceed is refused, the Court would generally require the liquidator to admit the creditor to prove for the amount of his claim, and of his costs of action and of the application to stay or the costs incurred until he had notice of the winding up. *Re Poole Fire Brick and Blue Clay Co.*, (1873) 17 Eq. 268; *Walker v. Banagher Distillery Co.*, (1875), 1 Q.B.D. 129; *Re Life Association of England*, (1864) 34 L.J. Ch. 64; *Re Keynsham Co.*, (1863) 33 Beav. 123. K
- (b) It would not be equitable for a Court to prevent under S. 136 a judgment-creditor from executing his decree without seeing that his rights are respected in the liquidation. 30 M. 533 following *Klanher v. Weill*, *Times*, L.R. 344. L
- (c) Where A obtained a decree against a Company, and B in execution of a decree which he had, attached A's decree, after the Company had gone into liquidation, held the Court should direct the liquidator to recognize B as the representative of A and should allow him to prove the decree debt in the name of A and to receive and apply dividends payable to A in satisfaction of his (B's) debt, subject to the claims of other attaching creditors to rateable distribution. 30 M. 633. M

(17) Dismissal of action no bar to proof of claim in winding-up.

The dismissal for want of prosecution of an action against a Company continued with the leave of the Court, does not debar the plaintiff from establishing his claim in the winding-up. *Orsell Colliery etc., Co.*, 12 Ch. D. 681. N

(18) Leave to proceed, no bar to examination under S. 163.

The granting of leave to proceed with an action will not enable the plaintiff or defendant therein from liability to examination in the winding-up under

1.—“When an order....leave of the Court”—(Concluded).

S. 163 and from answering questions relating to matters in dispute in the action. *E.P. Bateman*, 15 W.R. 118, 245=15 L.T. 263, 495; *Massey v. Allen*, 9 Ch. D. 164. O

(19) Action not to be consolidated with winding-up.

An action and a winding-up cannot be consolidated. *Lovatt v. Oxfordshire Ironstone Co.*, 30 Sol. J. 388; cited in Emden's winding-up of Companies, 8th Ed., p. 127. P

137. When an order has been made for winding-up a Company

Copy of order to be forwarded to Registrar.

under this Act, a copy of such order shall forthwith be forwarded by the Company to the Registrar of Joint-Stock Companies, who shall make a minute thereof in his books relating to the Company.

Such order shall be deemed to be notice of discharge to the servants of the Company, except when the business of the Company is continued ¹.

(Notes).

General.

Corresponding to English Law.

The first para of this section corresponds to S. 143 of the English Companies (Consolidation) Act of 1908. P-1

1.—“Such order....continued.”

(1) Voluntary winding-up not a notice of discharge to servants.

A voluntary winding-up does not operate as a notice of discharge to the servants. *Midland Counties District Bank v. Attwood*, (1905) 1 Ch. 357, distinguishing *Shirreff's* case, 14 Eq. 417. Q

N.B.—But the appointment of a receiver and manager in a debenture holder's action operates as a discharge. *Reid v. Explosives Co.*, 19 Q.B. Div. 264.

(2) Winding-up order, when operates as a notice of discharge to servants.

(a) The section expressly provides that a winding-up order is a notice of discharge to the servants of the Company when the business of the Company is not continued. See, also, *Chayman's* case, 1 Eq. 346; *Oriental Bank, Mac Dowell's* case, 32 Ch. D. 366. R

(b) But, if after a winding-up order the business of the Company is continued and the former servants are employed, it may be on the facts that the old contract continues in force. Emden's winding-up of Companies, 8th Ed., p. 164. S

(c) Buckley says that, under such circumstances, it may be that the discharge has been waived or a new contract entered into, in such case notice of discharge must be given pursuant thereto. See Buckley, 9th Ed., p. 457. See, also, *English Joint Stock Bank, E.P. Harding*, 3 Eq. 341. T

1.—“Such order....continued”—(Concluded).

(3) Servants' right to compensation for loss of service on winding-up.

- (a) If an officer or servant is employed at a fixed stipend for a certain term, and the Company is wound up before the expiration of the term, he will be entitled to prove for the value of an annuity equal to the value of his salary for the unexpired portion of the term, and can claim in addition the pecuniary value of any other benefits to which he was entitled under the contract. See *Yelland's case*, 4 Eq. 350; *E.P. Clark*, 7 Eq. 550; *Shireff's case*, 14 Eq. 417; *E.P. Harding*, 3 Eq. 341. U
- (b) But a deduction will be made in consideration of his being at liberty to obtain a fresh appointment. *Yelland's case*, 4 Eq. 350; *C.F. Hartland v. General Exchange Bank*, 14 L.T. 863, see, also, *E. P. Clarke*, 7 Eq. 550. Y
- (c) If, however, by the terms of the contract he is entitled to a fixed sum if the Company discontinue to employ him, this would mean a voluntary discontinuance, and would give no claim when the discontinuance is in consequence of a compulsory winding up. (*Tait's case* (Alb. Arb.), 16 Sol. J. 46; *E. P. Logan*, 9 Eq. 149. W
- (d) A person who is employed for a certain term and who is paid by a commission at a certain rate on the business transacted, if the Company is wound up before the expiration is not entitled to prove for the prospective commission during the unexpired portion of the term. *E. P. Machure*, 5 Ch. 737; see, also, *Hartland v. General Exchange Bank*, 14 L.T. 863; *Lewis's case*; (Alb. Arb.), 15 Sol. J. 828; *Rhodes v. Forwood* 1 A. C. 256; *Ogdens v. Nelson*, (1903) 2 K.B. 287 = (1904) 2 K. B. 410 = (1905) A. C. 109. X

N.B.—The principle is that where two parties mutually agree for a fixed period the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act at that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named. See *Buckley*, 9th Ed., p. 458.

138. Such Court may, at any time after an order has been made for winding-up a Company, upon the

Power of Court to stay proceedings.

application of any creditor or contributory of the Company¹, and upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time², on such terms and subject to such conditions as it deems fit.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 144 of the English Companies (Consolidation) Act of 1908, Y

General—(Concluded).

(2) Stay of proceedings in voluntary liquidation.

Under this section read with S. 182, *infra*, the Court may stay proceedings in a voluntary liquidation. *Steamship Totian Co.*, (1888) W.N. 17; *Schanechielf Electric Syndicate*, (1888) W.N. 166. Z

(3) Stay of proceedings in liquidations under supervision.

This section is applicable also to proceedings, in a winding-up subject to supervision. See S. 195, *infra*; see, also, *South Barrule Slate Co.*, 8 Eq. 688. A

1.—“Upon the application.... of the Company.”

(1) Application for stay, by whom to be made.

An application under the section can be made by a creditor or contributory of the Company, but cannot be made by the Company alone. If the Company applies, a creditor or contributory must join as an applicant. *Re Baxters Limited*, (1898) W.N. 60. B

(2) Application by alleged contributory, order on.

An order will not be made on the application of an alleged contributory unless he admits himself to be a contributory. *Continental Bank*, 15 W.R. 548 = 16 L.T. 112 = (1867), W.N. 114, 178. C.A. C

2.—“Make an order.... him.”

(1) Principles applicable to the exercise of Court's discretion.

(a) In exercising the jurisdiction to stay proceedings in winding up, the Court as far as possible acts upon principles applicable in exercising jurisdiction to rescind a receiving order, or annul an adjudication in bankruptcy against an individual. *Re Telescriptor Syndicate*, (1903) 174; *Cf. E.P. Hester*, 22 Q.B.D. 632; *Re Flatam*, (1898) 2 K.B. 219; *Re Izod*, (1898) 1 K.B. 241. D

(b) The Court refuses therefore to act upon the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether the stay will be conducive or detrimental to commercial morality and to the interests of the public at large. *Re Telescriptor Syndicate*, (1903) 2 Ch. 174. E

(c) Thus, the Court will see whether the directors have complied with their statutory duties in regard to the winding-up and also whether there are any matters connected with the promotion, formation, or failure of the Company or the conduct of its business or affairs which appear to the Court to require investigation. (*Ibid.*) F

N.B.—The same principles apply whether the Company has or has not invited the public to subscribe for shares. (*Ibid.*)

(2) Stay in part.

An order can be made under the section staying the winding-up proceedings in part and allowing the continuation of liquidation for certain purposes only, *e.g.*, for payment of creditors. *Western of Canada Oil Co.*, (1874) W.N. 148. G

(3) Stay with a view to resumption of business,

(a) In a proper case, the section may be used for purposes of re-construction and for enabling the Company to resume its business, *South Barrule Slate Quarry Co.*, 869, 8 Eq. 688; see, also, *Marine Investment Co.*, 8 Ch. 702; *Western of Canada Oil Co.*, (1874) W.N. 148; *Patent Automatic Knitting Co.*, (1882) W.N. 97. H

2.—“Make an order...him”—(Concluded),

- (b) Where a re-construction is sought the proceedings can be stayed in part, the liquidation being allowed to continue for certain purposes only, *e.g.*, for payment of debts, etc. *Western Canada Oil Co.*, (1874) W.N. 148. I
- (c) Any dissentient share-holders may, under such circumstances, be given an option to elect whether they would retire or continue to be members. If they elect to retire, the value of their interest in the Company will be ascertained and paid to them. *South Barrule Slate Co.*, 8 Eq. 688. J
- (d) In *Baxters Limited*, (1898) W.N. 60, a stay was granted with liberty to any dissentient creditor or the Official Receiver to apply within three months to remove the stay. J-1
- (e) “Where a Company wants to raise further capital to pay its debts and resume business, the further capital cannot be created in the winding up, and the winding-up cannot be stayed so far as relates to the payment of debts. The difficulty is met by taking an order under this section staying all proceedings in the winding-up, except for the necessary purposes, *e.g.*, ascertaining and satisfying the debts, and directing meetings of the members which can vote the new capital, elect a new board of directors, and so on.” *Buckley*, 9th Ed., p. 353. K

(4) Stay for preventing dissolution of a Company in voluntary liquidation.

Where the liquidators of a Company in voluntary liquidation have made the return to the Registrar under S. 187, *infra*, and time is running towards the moment when the Company will be dissolved, the Court may, for good cause shown, order a stay of the proceedings and thus the period of three months on the expiration of which dissolution will follow may be extended. *Re Eastern Investment Co., Ltd.*, (1905) 1 Ch. 352. L

(5) Stay of compulsory winding-up to allow voluntary liquidation to proceed.

Where a voluntary winding-up has been superseded by a compulsory order, the proceedings under the compulsory winding-up may be stayed so as to allow the voluntary winding-up to continue. *Re Bristol Victoria Potteries Co.*, (1872) 20 W.R. 569. M

139. When an order has been made for winding-up a Company

Effect of order on share-capital of Company limited by guarantee.

limited by guarantee and having a capital divided into shares, any share-capital that may not have been called up shall be deemed to be assets of the Company and to be a debt due to the Company from each member to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the Court.

140. The Court may, as to all matters relating to the winding-up,

Court may have regard to wishes of creditors or contributories.

have regard to the wishes of creditors or contributories as proved to it by any sufficient evidence¹, and may, if it thinks fit, direct meetings of the creditors or contributories to be summoned, held and conducted in such manner as the Court directs, for the purpose

of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court.

In the case of creditors, regard is to be had to the value of the debts due to each creditor, and, in the case of contributories, to the number of votes conferred on each contributory by the regulations of the Company.

(Notes).

General.

Corresponding English Law.

This section corresponds to Ss. 145 and 219 of the English Companies (Consolidation) Act of 1908. N

1.—“The Court may....evidence.”

(1) Application of the section.

- (a) The section applies at any time after the presentation of the petition and is not confined to questions arising after a winding-up order is made. The powers given by it may be exercised even before the order, when the petition is before the Court. See *Western Canada Oil Co.*, 17 Eq. 1. O
- (b) Thus, the Court may direct meetings to be held to ascertain whether the majority of the creditors or contributories are in favour of the compulsory order, and may give directions as to the time, place and manner of holding the meetings. (*Ibid*). P
- (c) The Court can exercise the same powers when the winding-up is subject to supervision. See S. 193, *infra*. Q

(2) Powers under the section discretionary.

- (a) The Court has a wide discretion in the matter of making a winding-up order, and having regard to the wishes of the majority of creditors or contributories it may dismiss the petition, or may make a supervision order, or may direct the petition to stand over upon terms. See *Langley Mill Co.*, 12 Eq. 26; *Planet Building Benefit Society*, 14 Eq. 441, 450; *Uruguay Central Railway Co.*, 11 Ch. D. 372, 383; *Chapel House Colliery Co.*, 24 Ch. D. 259. See, also, S. 193, *infra*. R
- (b) An order will seldom be made against the wishes of the majority of the share-holders unless the *substratum* of the Company be gone, or there be proof of fraud, or other circumstances showing to the satisfaction of the Court that the Company should be put an end to. *Professional Building Society*, 6 Ch. 856; *City and County Bank*, 10 Ch 470; *Factage Parisien*, 34 L.J. Ch. 140; *European Assurance Society*, 9 Eq. 122. S
- (c) The Court is not bound to make a compulsory order merely because the grounds for doing so are shown to exist. See *Metropolitan Saloon Omnibus Co.*, 5 Jur. (N.S.) 922; *Chepstow Bobbin Mills Co.*, 36 C.D. 563. T
- (d) But the Court is not bound to act according to the wishes of the majority of creditors or contributories. In exercising the discretion the Court

1.—“The Court may....evidence”—(Continued).

will have regard to all the surrounding circumstances and may, in a proper case, disregard the result of their meeting. See *Land Development Association*, (1892) W.N. 23. U

- (e) In determining what regard should be paid to the wishes of the creditors, the Court would consider not only the number of creditors and the amount of their debt but also the reasons assigned for their conclusion. *Great Western, etc., Coal Co.*, 21 Ch. D. 769. Y

(3) Dismissal of petition at the wish of majority.

- (a) Where a Company is in voluntary liquidation, and a petition is presented for a compulsory order, the Court may at the instance of the majority of creditors or share-holders reject the petition if the petitioner does not show that a compulsory winding-up would be the preferable course or that he would be prejudiced by the voluntary winding-up. See *Langley Mill Co.*, 12 Eq. 26; *Universal Drug Supply Association*, (1874) W.N. 125; *New York Exchange*, 39 Ch. D. 415. See, also, *S. 189, infra*. W

N.B.—The Act has created as between share-holders a domestic tribunal entrusted with powers of determining questions relating to the liquidation of the Company and Courts will not readily interfere and withdraw from it the decision of such questions. *Langham Skating Rink Co.*, 5 Ch. D. 669; *Gold Co.*, 11 Ch. D. 701, 710; *Middlesborough Assembly Rooms*, 14 Ch. D. 104.

- (b) A petition presented on the ground that the Company had ceased to carry on business for more than a year was dismissed at the wish of a majority of share-holders, when it was shown that the suspension of business was due to depression of trade, and that the Company intended to resume business. *Middlesborough Assembly Rooms*, 14 Ch. D. 104. See, also, *Petersburg Gas Co.*, (1874) W.N. 196. X
- (c) The Court may also dismiss a petition presented by a creditor if his interest and liability are very small. *London Suburban Bank*, 6 Ch. 641; *Professional etc., Sac.* 6 Ch. 856. Y
- (d) Or if a winding-up order would be useless.

(4) Adjournment at the wish of majority.

- (a) A majority of share-holders may get an adjournment of the petition by showing that there is a reasonable hope of the Company making arrangements for the payment of its debts and for carrying on the business. *Brighton Hotel Co.*, 6 Eq. 339. But see *Home Assurance Association*, 12 Eq. 112, where an adjournment was refused. Z
- (b) An adjournment may, under similar circumstances, be granted, also at the wish of a majority of creditors. See *Western Canada Oil Co.*, 17 Eq. 1; *Great Western Coal Co.*, 21 Ch. D. 769; *St. Thomas Dock Co.*, 2 Ch. D. 116. A

N. B.—As between himself and other creditors a creditor is not entitled *ex debito justitiæ* to a compulsory order, though as between himself and the Company he is entitled to an order if he brings his case within the Act. *Westhartlepool Co.*, 10 Ch. 618; *Uruguay Central Railway Co.*, 11 Ch. D. 872; *Great Western Coal Co.*, 21 Ch. D. 769; *Chapel House Colliery Co.*, 24 Ch. D. 259; *Krasfolsky Co.*, (1892) 3 Ch. 174, 177.

1.—“*The Court may....evidence*.”—(Continued).

- (c) Where after the passing of a resolution for the voluntary winding-up of a Company, a petition for compulsory order is presented, the Court may adjourn the petition in order that the question of voluntary winding-up may be determined. *City and County Bank*, 10 Ch. 470. **B**
- (d) The drawing up of the order may in some cases be delayed in order to give the Company a chance of satisfying the claim. *Emden's winding-up of Companies*, 8th Ed., p. 89. **C**
- (e) But the drawing up will not be postponed in order to enable the Company to satisfy its creditors with the proceeds of a call about to be made. *Home Assurance Assn.*, 12 Eq. 112. **D**
- N.B.**—Where the Court has no power to make a winding-up order, it cannot direct an adjournment for the purpose of holding a meeting. *Joint Stock Coal Co.*, 8 Eq. 146.

(5) Order against the wish of majority.

- (a) The Court is not bound to act according to the wishes of the majority of creditors or contributors. An order may be made against the wishes of the majority if there are matters requiring investigation such as a preponderating influence on the part of one or more members who prevent a voluntary resolution being passed or insist on a voluntary liquidation. *Varieties Ltd.*, (1893) 2 Ch. 235; *West Surrey Tanning Co.*, 2 Eq. 737. **E**
- (b) Similarly, if the Company has been in voluntary liquidation, and the winding-up has not progressed satisfactorily, or is under the control of a single man, an order will be made even against the wishes of the majority. See *Manchester Queensland Cotton Co.*, 15 W.R. 1070=16 L.T. 583; *Bishop and Sons*, (1900) 2 Ch. 254. **F**
- (c) An order may be made against the wishes of the majority, then there are suspicions of fraud. See *Manchester Queensland Cotton Co.*, 15 W.R. 1070=16 L.T. 583. **G**
- (d) Or where the substratum of the Company is gone. *Great Northern Copper Mining Co.*, 17 W.R. 462=20 L.T. 264; see, also *Havan Gold Mining Co.*, 20 Ch. D. 151; *German Date Coffee Co.*, 20 Ch. D. 169; *Amalgamated Syndicate*, (1897) 2 Ch. 600. **H**
- (e) Or where the Company is *de facto* unable to pay its debts. *Ex parte Spartali and Tabor*, 14 L.T. 726. **I**
- (f) Or where some plain injustice is being done which cannot be remedied except by a compulsory order. *Professional Building Society*, (1871) 2 Ch. 856; *City and County Bank*, (1875) 10 Ch. 470. **J**
- (g) If the Company is insolvent, the assets belong to the creditors rather than to shareholders; and it is only by a compulsory order that they can get control. *Isle of Weight Ferry Co.*, (1864) 2 H. & M. 597; *Lonsdale Vale Ironstone Co.*, (1868) 16 W.R. 601. **K**
- (h) Where the petition stood over for three months and nothing had been due, an order was made against the wishes of the majority of debenture-holders. *Western Canada Oil Co.*, 17 Eq. 1. **L**

(6) Appointment of liquidators according to the wishes of majority.

- (a) In the appointment of liquidators in a compulsory winding-up and also in a winding-up under supervision, the Court may have regard to the wishes of the majority of creditors or contributories. See Ss. 140, 193. **M**

1.—“The Court may....evidence”—(Concluded).

(b) Thus, at the wish of a majority of unsecured creditors the petitioner's nominee was removed and two creditors who agreed to act gratuitously were appointed. *Association of Land Financiers*, 10 Ch. D. 269. N

(c) Where the Company was insolvent a liquidator appointed by the shareholders was removed at the desire of all the creditors. *Oxford Building, etc. Co.*, 49 L. T. 495. O

Official Liquidators.

141. For the purpose of conducting the proceedings in winding-up a Company and assisting the Court therein, there may be appointed a person or persons, to be called an official liquidator or official liquidators. ¹

Appointment of
official liquidator.

The Court may appoint such person or persons either provisionally or otherwise, ² as it thinks fit, to the office of official liquidator or official liquidators.

In all cases, if more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

The Court may also determine whether any, and what, security is to be given by any official liquidator on his appointment. ³

If no official liquidator is appointed, or during any vacancy in such appointment, all the property of the Company shall be deemed to be in the custody of the Court.

A receiver shall not be appointed of assets in the hands of an official liquidator. ⁴

(Notes).

General.

Corresponding English law.

This section corresponds to S. 149 sub-Ss. (1) to (5) and S. 150 sub-S. (2) of the English Companies (Consolidation) Act of 1908.

The English Act throughout uses the word ‘liquidator’ simply, and not ‘official liquidator’ to denote the liquidator appointed in a winding up by the Court. The provisions of the section as to the security to be given by the liquidators are the same as, under the English law are applicable to Companies wound up in Scotland or Ireland. Where the proceedings are in England S. 149 (3) (c) provides when a person other than the official receiver is appointed liquidator he shall not be capable of acting as liquidator until he has notified his appointment to the Registrar of Companies and given security in the prescribed manner to the satisfaction of the Board of Trade.

General—(Concluded).

The rule that in the absence of a liquidator the property shall be deemed to be in the custody of the Court applies under the English law only when the winding up is in Scotland or Ireland.

When the proceedings are in England, if no liquidator is appointed or if there is a vacancy in such appointment the official receiver by virtue of his office becomes the liquidator. See S. 149 (7) and* (152) (3) of the English Act.

The English Act contains no provision corresponding to the last *para.* of this section. P

I.—“For the purpose....an official liquidator or official liquidators.”**(1) Liquidator—Position of.**

(a) As the object of the winding up is the collection and distribution of the assets of the company among its creditors, the property of a company in liquidation is in the nature of trust property, and the liquidator stands in the position of a trustee of the property of the company for those who were creditors at the time of the winding up. See *Re Oriental Inland Steam Co., E.P. Scinde Rail. Co.*, (1874) 9 Ch. A.P. P. 557, 559, 560. See also *General Rolling Stock Co., Joint Stock Discount Co.'s claim*, 7 Ch. 646 = 26 L.T. 755 (M.R.); *Black & Co.'s case*, 8 Ch. 254, 262; *Delhi Bank's case* (Alb. Arb.) 15 Sol. J. 923, 924. Q

(b) Hence, the Statute of Limitation does not run against the creditors in a winding-up. *Joint Stock Discount Co.'s claim*. 7 Ch. 646. R

(c) The liquidator is also in the position of a trustee to the share-holders. See *Australian United Gold Mining Co.*, W.N. 1877, p. 37. S

(d) But he is not a trustee for each individual creditor or contributory, and in a strict sense he is not a trustee at all. On the winding-up, the property of the company ceases to be beneficially the property of the company and passes into liquidator's custody to be applied by him as directed by the Act. He is, in short, an agent of the company under a statutory duty to pay the debts of the company, and subject thereto, to distribute the assets among the share-holders. See *Knowles v. Scott* (1891), 1 Ch. 717, 722, 723; *Hills Waterfall Co.*, 1896, 11 Ch. 947. See also *Re Oriental Inland Steam Co., E.P. Scinde Rent Co.*, (1874) 9 Ch. App. 557. T

(2) Action against liquidator for breach of trust.

(a) Though a creditor or contributory, can, during the continuance of winding-up, apply to the court for the enforcement of his rights, he cannot sue the liquidator for breach of trust or neglect of duty other than active misfeasance. *Knowles v. Scott*, (1891) 1 Ch. 717; *Hills Waterfall Estate Co.*, (1896) 1 Ch. 947. U

(b) But, after the dissolution of the company, a creditor may sue the liquidator for damages if he (the liquidator) had, with a knowledge of the creditor's claim, left his debt unpaid. See *Pulsford v. Devenish*, (1903) 2 Ch. 625. V

(3) Liquidator how far a receiver.

For the purpose of acquiring or retaining possession of assets, the liquidator is in the position of a receiver, appointed by the court. See *Gooch's case*, 7 Ch. 207; *Marine Mansions Co.*, 4 Eq. 601. W

I.—“For the purpose . . . an official liquidator or official liquidators—(Old).

(4) Representative character of the liquidator.

(a) The liquidator is generally said to represent both the creditors and the company at the same time. See *Sichell's case*, 3 Ch. 119, 122; *Marine Mansions Co.*, 4 Eq. 601, 610. **X**

(b) As to how far the liquidator can enforce the rights of the creditors as independent of and paramount to those of the company and how far he can enforce them only in the right of the company the result of the decisions and *dicta* is stated thus; although the liquidator is substituted for and enforces the rights of creditors in the right of the company, yet (1) the winding up order calls into existence new rights and new liabilities which did not exist before, and (2) equities which might have been set up against the company cannot prevail against the liquidator as representing the creditors. *Buckley*, 9th Ed, P. 365. **Y**

(5) General duty of liquidator.

As an officer of the court the liquidator is bound to maintain an even and impartial hand between all the individuals whose interests are involved in the winding up. It is his duty to the whole body of creditors, the whole body of share-holders, and to the court, to make himself thoroughly acquainted with the affairs of the company and to suppress or conceal nothing coming to his knowledge in the course of his investigation which is material to ascertain the exact truth in every case before the court; and it is for the judge to see that he does his duty in this respect. *Gooch's case* (1872), 7 Ch. App. 207; *cited* in *Halsbury's Laws of England*, Vol. V. p. 442. **Z**

(6) Court's control over liquidators proceedings.

(a) In the discharge of his duties the liquidator is subject to the control of the Court, and where a claim is made against the Company for which there is manifestly no defence the Court will not permit him to resist the claim on technical grounds as to procedure. See *General Share and Trust Co. v. Wetly Brick and Pottery Co.*, 1892, 20 Ch. D. 260 C.A. **A**

(b) The Court will also insist, on the liquidators acting in an upright manner even to the Company's opponent, but he must not be generous at other persons' expense. *Re Condon, E.P. James*, 1874, 9 Ch. App. 609; *Re Opera Ltd.*, 1891, 2 Ch. 154=1891, 3 Ch. 260 C.A. *cited* in *Halsbury's Laws of England*, Vol. V.P. 443. **B**

(c) A liquidator to whom money has been paid under mistake of law, would be ordered to refund it. *E.P. Simmonds*, 16 Q.B.D. 308; *Dixon v. Brown*, 32 Ch. D. 597; *Opera Ltd.*, 1891, 2 Ch. 154=3 Ch. 260. **C**

N.B.—Even voluntary liquidators appointed by the Company are, in the discharge of their duties subject to the control of the Court. Once appointed, they cannot be dismissed by the company. They can be removed only by the Court. See 30 M. 22. **D**

(7) Inspection of Company's books—Duty of liquidator to assist.

Where a creditor or contributory has obtained an order from the Court to inspect the Company's books and papers, it is the duty of the liquidator to give such creditor or contributory not only access to the books and papers but every assistance and facility in finding out which are the relevant books and papers required, and to place any

1.—"For the purpose....an official liquidator or official liquidators—(Ctd).

information already obtained at his service. But he is not obliged, at the instance of every person interested in every questions arising, to make that fresh and careful investigation of books and documents in his possession which would be requisite to enable him to make the ordinary affidavit required from a party called on to make discovery. Gooch's case, 1872, 7 Ch. App, 207. E

N.B.—After winding up order creditors and contributories can inspect the Company's books and papers only on obtaining the order of the Court under S. 200, *infra*. Persons other than creditors and contributories have no right to inspect. The provisions of S. 55 *supra*, as to the inspections of the register of members do not apply to a Company in liquidation. See *Kent Gold Fields*, 1898, 1 Q.B. 754. F

(8) Discovery from the liquidator.

(a) Creditors or contributories cannot obtain discovery from the liquidator unless he represents the company as a party litigant. Gooch's Case, 7 Ch. 207; *Mutual Society*, 22 Ch. D. 714. G

(b) Thus, the liquidator cannot be called upon to make a discovery as to whether the conditions requisite for placing a person on the B list of contributories exist, and if so, what is the extent of his liability, for, these are questions as to which the existing company have no concern. Gooch's Case, 7 Ch 207.

(c) Where however the liquidator represents the Company as a party-litigant in an action by or against strangers or in a proceeding in the winding up the opposite party has the same right to discovery as from any other litigant. (*Ibid*). I

(d) As regards contributories, an alleged A contributory can require discovery from the liquidator but not an alleged B contributory. See *Barned's Banking Co., E.P. Contract Corporation*, 2 Ch. 350; *Gooch's case*, 7 Ch. 207, 212. J

N.B.—"The reason for the difference is that as against the A contributory the liquidator is a party-litigant while against the B contributory he is not. In showing the liability of an A contributory all the other A contributories, *i.e.*, the existing Company, are interested; in showing the liability of a B contributory, the existing Company being previously liable for everything is not interested at all. It is a question with which creditors only are concerned, and in the contest, the Company, as represented by its liquidator, is not to be treated as a litigant." *Buckley*, 9th Ed., p. 372. K

N.B.—The distinction thus drawn is also an authority for the proposition that the liquidator represents the creditors only in the right of the Company. See *supra*.

(e) In a proper case discovery can be obtained from the liquidator in his personal as distinguished from his representative character. *Sir John Moore Gold Co.*, 37 L.T. 242. M

(9) Admissions by liquidators.

(a) A liquidator cannot bind the company by admissions made outside the scope of his authority. See *Empire Corp.*, 17 W.R. 431=20 L. T. 103. N

(b) Thus, his admissions are inadmissible for the purpose of proving an amalgamation. (*Ibid*).

1.—“For the purpose....an official liquidator or official liquidators—(Cld).

(10) Who should be appointed liquidator.

(a) The liquidator should be a disinterested person. As a general rule, a shareholder should not be appointed. *Northumberland & Durham District Banking Co.*, 2 De. G. J. 508. P

(b) It would be proper to appoint the secretary of the Company as he would have a knowledge of the affairs of the Company. *London and Australian Agency Corporation*, 29 L.T. 417 = 22 W.R. 45. Q

(c) “But when there are matters requiring investigation an independent liquidator will be taken.” *Buckley*, 9th Ed., p. 362. R

(11) Liquidator not to act as a Vakil of a creditor.

It is not competent for a person after his appointment as liquidator to continue to act as vakil of a creditor whose debt is in dispute in the liquidation. 9 A. 180 (183). S

N.B.—No liquidator, however honestly disposed he may be, can possibly do his duty to a client who is claiming to rank on the estate as a creditor, and at the same time to do his duty to the estate and the contributors and the other creditors, when his client's claim to rank as a creditor is in dispute. 9 A. 180 (183, 184). T

(12) Appeal as to appointment of liquidator.

(a) The Court of Appeal will not, except when a question of principle is involved, interfere with an appointment of liquidator made by a Judge in the exercise of his discretion. *Albert Average Ass.*, 5 Ch. 597; *International Contract Co.*, 1 Ch. 523; *London Quays Company*, 3 Ch. 394. U

(b) But an appeal will be heard when a question of principle is involved. *Perry v. Oriental Hotel Co.*, 5 Ch. 520. (Giffard, L.J.). Y

2.—“The Court may appoint...otherwise.”

(1) Provisional liquidators—Appointment.

(a) Provisional liquidators may be appointed at any time after the presentation of the petition and before the first appointment of liquidators. See S. 134, *supra*. W

(b) In England after a winding up order is made no person other than the official receiver can be appointed as a provincial liquidator; the official liquidator becomes the provincial liquidator by virtue of his office. See *North Wales Gun powder Co.*, 1892, 2 Q.B. 220; also S. 149 (3) (b) of the English Companies (Consolidation) Act. X

N.B.—As to the powers of a provincial liquidator, see notes to S. 144, *infra*.

(2) Restriction on the powers of provisional liquidator.

Where an official liquidator is provisionally appointed, the Court may restrict his powers by the order appointing him. See S. 145, *infra*. X-1

N.B.—Where several liquidators are appointed the conduct of any particular matter arising in the course of liquidation may be given to one of them whether the winding up is compulsory or under supervision. *Midland Land Corp.* (1887), W. N. 58. Y

3.—“The Court may also determine....appointment.”**(1) Security before winding-up order.**

The Court may fix the security before it makes the winding-up order. *Re Mercantile Bank of Australia*, 1892, 2 Ch. 204. **Z**

(2) Alteration of security.

The security may be increased or decreased from time to time as the Court may think fit. See *Evans and Cooper*, p. 187. **A**

4.—“A receiver....official liquidator.”**Appointment of receiver—English law.**

(a) There is no provision in the English Act corresponding to the last para. of this section.

Under the English law, a receiver may be appointed either before or after or contemporaneously with the liquidator. S. 162 of the English Act provides that where a Company is being wound up by the Court, and an application is made for the appointment of a receiver on behalf of the debenture-holders or other creditors of the Company, the official receiver may be so appointed; s. 161 of the same Act provides that when the official receiver becomes the liquidator whether personally or otherwise, the Court may, on his application, appoint a special manager with the powers of a receiver. **A-1**

(b) Whenever a receiver is appointed, in the absence of special circumstances it is usual to combine the two offices in the person of the liquidator. See *Buckley*, 9th Ed., pp. 362, 363 and the cases therein cited. **B**

142. Any official liquidator may resign or be removed by the

Resignations, removals, filing up vacancies and compensation.

Court on due cause shown¹. Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court. There shall be paid to the official liquidator such salary or remuneration by way of percentage or otherwise, as the Court may direct²; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

(Notes).**General.****Corresponding English law.**

This section corresponds to S. 149 (6), (7) and (8) of the English Companies (Consolidation) Act of 1908. The provisions of this section relating to the remuneration of the liquidators apply under the English Act only where a person other than the official receiver is appointed liquidator. **C**

1.—“Any official liquidator....on due cause shown.”**(1) Removal of liquidators.**

(a) In the matter of appointing and removing liquidators as in other matters relating to winding up the Court may have regard to the wishes of the majority of creditors and contributories, (See S. 140, *supra*). **D**

1.—“Any official liquidator...on due cause shown”—(Concluded).

(b) Thus, at the wish of a majority of unsecured creditors, the petitioner's nominee was removed and two persons who consented to act gratuitously were appointed as liquidators. *Association of Land Financiers*. 10 Ch. D. 269. E

(c) Similarly, at the wish of all the creditors of a solvent Company a liquidator appointed by the share-holders was removed. *Oxford Building Co.*, 59 L.T. 495. F

(d) Where the assets were deficient, and the liquidator persisted in proceeding with an action contrary to the wish of the majority of creditors, the liquidator was removed. *Tavistack Ironworks Co.*, 19 W.R. 672=24 L.T. 605. G

N.B.—Where two amalgamated Companies were wound up compulsorily, one of the liquidators of one Company was also appointed liquidator of the other Company with directions for the appointment of separate solicitors for the two Companies in cases where their interests might clash. *Western Life Assurance Society*, *E.P. Willet*, 5 Ch. 396. H

N.B.—But if one of such Companies is in voluntary liquidation, the voluntary liquidators will not necessarily be displaced. *British Nation Assurance Society*, *E.P. Handerson*, 14 Eq. 492. I

2.—“There shall be paid...may direct”.

(1) Liquidator's remuneration—Order of priority.

As to the order of payment of the liquidator's remuneration in the distribution of the assets, see notes to S. 158, *infra*. J

(3) Remuneration, how fixed.

In fixing the amount of remuneration payable to the liquidators, the Court will have regard to the particular circumstances of each case. *Amalgamated Syndicate*, 1901, 2 Ch. 181. K

143. The official liquidator shall be described by the style of

the official liquidator of the particular Company in respect of which he is appointed, and not by his individual name. He shall take into his custody, or under his control, all the property, effects and actionable claims to which the Company is or appears to be entitled, ¹ and shall perform such duties in reference to the winding-up of the Company as may be imposed by the Court.

Style and duties
of official liquidator.

(Notes).

General.

Corresponding English law.

The first sentence of this section corresponds to S. 149 (9) of the English Companies (Consolidation) Act of 1908. The second sentence corresponds to S. 150 (1) and S. 149 (1) of the same Act.

Instead of the words “property, effects and actionable”, the English Act contains the words “property and things in action.”

Under the English Act it is only where the proceedings are in Scotland or Ireland that the liquidator is described by the style of the official

General—(Concluded).

liquidator of the particular Company in respect of which he is appointed; but where the proceedings are in England and a person other than the official receiver is appointed liquidator, he is described by the style of the liquidator, and if the official receiver is appointed he is described by the style of the official receiver and liquidator of the particular Company in respect of which he is appointed. L

1.—“He shall take....entitled.”

(1) Liquidator's right to possession of Company's books.

The liquidator is entitled to the possession of those books and documents over which no valid lien had been acquired before the commencement of winding up. But he is not entitled to the possession of any documents covered by such lien though he can obtain such production of the documents as may be necessary for the purpose of liquidation. *Re Capital Fire Insurance Association*, 1883, 24 Ch. D. 408; 420 C. A.; *Re Anglo Maltese Hydraulic Dock Co.*, 1885, 54 L.J. 730. See also, S. 162, *infra*. M

(2) Company's property does not vest in liquidator.

A winding up order has not the effect of vesting the company's property in the liquidator except where a vesting order is made under S. 247 *infra*, in the case of an unregistered company. The property remains in the company until dissolution, unless disposed of in due course of winding up. *Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23, 49, 52. N

144. The official liquidator shall have power, with the Powers of official sanction of the Court, to do the following liquidator. things:—

- (a) to bring or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the Company¹;
- (b) to carry on the business of the Company so far as may be necessary for the beneficial winding-up of the same;²
- (c) to sell the immoveable and moveable property of the Company by public auction or private contract³, with power to transfer the whole thereof to any person or Company, or to sell the same in parcels;
- (d) to do all acts, and to execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the Company's seal;
- (e) to prove, rank, claim and draw a dividend in the matter of the insolvency of any contributory, for any balance against the estate of such contributory, and to take and

receive dividends in respect of such balance, in the matter of the insolvency, as a separate debt due from such insolvent, and rateably with the other separate creditors ⁴;

- (f) to draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the Company ⁵; also to raise, upon the security of the assets of the Company, from time to time, any requisite sum or sums of money ⁶; and the drawing, accepting, making or endorsing of every such bill, hundi or note as aforesaid on behalf of the Company shall have the same effect with respect to the liability of such Company as if such bill, [hundi] or note had been drawn, accepted, made or endorsed by or on behalf of such Company in the Course of carrying on the business thereof ;
- (g) to take out, if necessary, in his official name, letters of administration to the estate of any deceased contributory ⁷, and to do, in his official name, any other act that may be necessary for obtaining payment of any moneys due from a contributory or from his estate, and which act cannot be conveniently done in the name of the Company; and, in all cases where he takes out letters of administration, or otherwise uses his official name for obtaining payment of any moneys due from a contributory, such moneys shall, for the purpose of enabling him to take out such letters or recover such moneys, be deemed to be due to the official liquidator himself : Provided that nothing herein contained shall be deemed to affect the rights, duties and privileges of the Administrators General of Bengal, Madras and Bombay, respectively ;
- (h) to do and execute all such other things as may be necessary for winding-up the affairs of the Company and distributing its assets.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 151, sub-section (1), clauses (a) and (b), and sub-S. (2), clauses (a) to (g) of the English Companies (Consolidation) Act of 1908.

General—(Continued).

The powers conferred by sub-S. (1), clauses (a) and (b), which correspond to clauses (a) and (b) of S. 144 of the Indian Act, may be exercised by the liquidator in the case of a winding-up by the Court in England, either with the sanction of the Court or of the committee of inspection, and in the case of a winding-up in Scotland or Ireland, with the sanction of the Court.

As regards powers conferred by sub-S. (2), clauses (a) to (g), that sub-section provides that the liquidator in a winding-up by the Court shall have power to exercise them but (subject to the provisions of that section) in the case of a winding-up in Scotland or Ireland, only with the sanction of the Court.

Sub-section (3) provides that "the exercise by the liquidator in a winding-up by the Court in England of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers." S. 151, sub-S. (2) (a), of the English Act which corresponds to cl. (c) of the present section, contains the words "real and personal property, and things in action instead of the words immoveable and moveable property" that are found in the Indian Act.

Sub-S. (2), cl. (d) of the English Act which corresponds to the first part of cl. (f) of the present section, does not contain the word 'hundi.'

The English Act does not contain any proviso corresponding to the proviso at the end of cl. (g) of the present section. O

(2) Delegation to liquidators of certain powers of Court in England.

In addition to the powers conferred by S. 151 of the English Act, liquidators of a company that is being wound up in England, may, under rules made under S. 173 of that Act be enabled or required to do all or any of the powers and duties of the Court in respect of the following matters:—

- (a) holding and conducting meetings to ascertain the wishes of creditors and contributories,
- (b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets,
- (c) requiring delivery of property or documents to the liquidator,
- (d) making calls,
- (e) fixing a time within which debts and claims must be proved.

Provided that the liquidator shall not without the special leave of the Court, rectify the register of members, and shall not make any call without either the special leave of the Court or the sanction of the Committee of Inspection.

N.B.—As to the rights, powers and duties of the Administrator General, see the Administrator General's Act (II of 1874), Part III. P

(3) Powers of voluntary liquidator.

The powers conferred by this section on the official liquidator, may, in the case of a voluntary winding-up, be exercised by the voluntary liquidator without the sanction of the Court. See S. 177 (g), *infra*. Q

General—(Concluded).

(4) Powers of provisional liquidator.

- (a) The Act nowhere expressly defines the powers of the provisional liquidator. They are to be made out by putting together and comparing various sections. *English Bank of the River Plate* (1892), 1 Ch. 391. R
- (b) He can settle the list of contributories. (*Ibid.*) S
- (c) He may examine and reject proofs. See *Emden's Winding-up of Companies*, 8th Ed., p. 89. T
- (d) He may make advances, if beneficial, to creditors. 1 Ind. Jur. N. S. 335.T-1
N.B.—But he is not allowed to borrow. 1 Ind. Jur. N. S. 350.
- (e) As between a receiver appointed in a debenture holder's action, and a provisional liquidator, the latter is entitled to the custody to such of the books and documents of the Company as relate to its management and business and are not necessary to support the title of the debentures. *Engel v. South Metropolitan Brewing Co.* (1892), 1 Ch. 442.U

(5) Restrictions on the powers of provisional liquidator.

Where a provisional liquidator is appointed before a winding-up the Court may restrict his powers to certain specified acts. See S. 145, *infra*. See, also, *Bound & Co.* (1893), W. N. 21. Y

(6) General sanction to liquidator.

- (a) The Court can make an order in general terms empowering the liquidator in a compulsory winding-up to do all the acts referred to in the section without obtaining the Court's sanction in each particular case, thereby placing the official liquidator in the same position as a liquidator in voluntary winding-up or winding-up subject to supervision. See *Rochdale Property Co.*, 12 Ch. D. 775. W

N.B.—For the converse case, of restrictions imposed on the powers of a liquidator in a winding-up under supervision, thereby bringing him to the level of a liquidator in a compulsory winding-up, see *London Quays & Warehouses Co.*, 3 Ch. 394 noted under S. 195, *infra*. Cf. *Watson & Sons, Ltd.* (1891), 2 Ch. 55, 62.

- (b) The Court will not generally be inclined to make an order in general terms. See *Britannia Building Society* (1890), W. N. 170. X

(7) Principles guiding Court's discretion in granting sanction.

In giving sanction in respect of any of the acts specified in this section the Court will have regard to the following facts, namely, (i) whether the act, in respect of which its sanction is asked, will or will not operate to the prejudice of the estate; and (ii) the main purpose of the Act, *viz.*, the collection and distribution of the assets for the general benefit of the creditors and amongst the creditors *pari passu*. *Buckley*, 9th Ed., p. 374. Y

N.B.—S. 147 provides that as soon as may be after the winding-up order, the Court shall cause the assets of the Company to be collected and applied in discharge of its liabilities.

1.—“To bring....on behalf of the company.”

(1) Proceedings in winding-up need no sanction.

The proceedings referred to in clause (a) do not include proceedings in the winding-up. The liquidator may institute such proceedings without the sanction of the Court. *Silver Valley Mines*, 21 Ch. D. 387. Z

I.—“To bring....on behalf of the company”—(Continued).

(2) Whether Court can sanction compromise of claims under this section.

Under S. 212, *infra*, the official liquidator has, with the sanction of the Court, power to compromise calls, &c. As to whether the Court can sanction a compromise, under this section, and if it can, whether a general sanction includes a power to compromise, see *Re South Eastern Portugal Railway Co.*, 17 W.R. 760 (809)=20 L.T. 800=21 L.T. 220. A

N.B.—In order that the Court may sanction a compromise whether under this section or S. 202, *infra*, it must have before it such evidence as will enable it to exercise a judicial discretion in the matter. (*Ibid.*)

(3) Sanction to appoint attorney or vakil.

A sanction to bring or defend a suit does not include a sanction to appoint an attorney or vakil. If the liquidator wants to employ an attorney or vakil, he must obtain a separate sanction for it under S. 146, *infra*. See *London Metallurgical Co.*, (1897), 2 Ch. 262. B

N.B.—A liquidator who is an attorney, should not employ his partner as his attorney, unless he consents to act without remuneration. S. 146, *infra*. See, also, *Universal Private Telegraph Co.*, 19 W.R. 297=23 L.T. 884.

(4) Suit brought by liquidator in his own name, whether liable to be dismissed for defect of form.

(a) In 17 A. 292 it was held that the requirement of the section as to bringing or defending suits in the name and on behalf of the Company was distinctly of a formal nature, and a substantial compliance with it was insufficient, that when the official liquidator was acting in the name and on behalf of the Company, it was the Company and not the official liquidator who was the plaintiff. A suit, therefore brought, not in the name of the Company, but in the name of the official liquidator, was bad in form and should be dismissed. The defect could not be permitted to be rectified by amendment of the plaint.

(b) But in 18 A. 198 (F.B.) the decision in 17 A. 292 has been overruled and it has been held that where the liquidator institutes a suit, not in the name of the Company, but in his official name only, there is a substantial compliance with the provision of the Act, and, that, even if the plaint should be considered defective, the defect can be set right by an amendment, and as the effect of the amendment would not be to bring a new plaintiff on the record so as to let in the operation of S. 22 of the Limitation Act, the amendment may be allowed to be made, even after the period prescribed for bringing the suit. C

(5) Suit by liquidator of unregistered Company in his own name.

(a) The liquidator of an unregistered Company may sue in his own name on behalf of the Company, a contributory for payment of a call. *Tarquand v. Kirby*, 4 Eq. 123. D

(b) He may also sue in his own name and on behalf of the Company in cases in which, if the Company had been a going concern some of the shareholders might have sued on behalf of themselves and the remaining shareholders other than the defendants. *Tarquand v. Marshall*, 6 Eq. 124=4 Ch. 376. E

(c) Thus he may institute a suit in his own name against directors to compel them to make good the losses caused by their misconduct. (*Ibid.*) F

1.—“To bring...on behalf of the company”—(Continued).

(6) Suit by liquidator—Defendant's right to set off.

- (a) In a suit by the liquidator to recover a debt due to the company, the defendant is entitled to set off against the debt, any liquidated sum due to him from the company. 28 M. 240 following *Anderson's* case, 3 Eq. 337 and *Sovereign Life Assurance Co. v. Dodd*, L.R. (1892), 2 Q.B.D. 573. G
- (b) A person deposited a certain amount in a *Nidhi* for a period of twelve months, and, before the termination of the twelve months borrowed a certain amount on the security of his deposit for which he executed a pro-note which provided that the Company, on his failure to pay the principal and interest due to the Company, was to pay only the balance of the deposit after deduction of principal and interest; *held* that in a suit by the liquidator to recover the amount of loan on the company going into liquidation, the depositor was entitled to set off the loan as against the sum due to him from the Company. 15 M.L. J. 230=28 M. 240. H
- (c) A director cannot set off a debt due by the Company to him against a claim made against him by the liquidator under S. 214, *infra*. 7 Bom. L.R. 246. I

(7) Suit by liquidator—Director's liability to answer interrogatories.

Directors do not cease to be officers of the Company in winding-up, and may be required to answer interrogatories as officers in an action by the liquidator. *Madrid Bank v. Bayley*, L.R. 2 Q.B. 37. J

(8) Suit for calls—Limitation.

- (a) A suit by the official liquidator of a registered Company to recover from a share-holder money due in respect of unpaid calls is governed by Art. 120; First Schedule, of the Indian Limitation Act (IX of 1908), and must be brought within six years. 70 P.R. 1908. See, also, 10 A. 483. K
- (b) In 17 B. 472, it was not necessary to decide whether the period of limitation was six years or three years; the Court merely held that assuming the period to be three years, the suit was not barred, as the plaint was presented within three years since the defendant's name was inscribed in the register of members as the holder of the shares in respect of which the calls were made. See, also, 17 B. 469. L

(9) Action against Directors—Limitation—English and Indian laws.

- (a) In an action against the directors of a Company for applying the funds of the Company in a manner which is *ultra vires* the memorandum, the directors are, in England, precluded from pleading the bar of the Statute of Limitations by virtue of either a general rule of the Court of Equity applicable to all trustees or quasi-trustees, or else by the Judicature Act of 1873 which is applicable to all persons “holding” property upon trust. See *In re Oxford Benefit Building, and Investment Society*, 85 Ch. D. at p. 509; also, *In re Sharpe*, L.R. (1892), 1 Ch. at p. 165. M
- (b) But, in India, Directors are not precluded from pleading the bar of limitation. The question is to be decided by reference to S. 10 of the Indian Limitation Act (IX of 1908) and though Directors of a Company are *quasi-trustees*, it would be unduly straining the language of S. 10 of

1.—“To bring....on behalf of the company”—(Continued).

the Limitation Act to say that they are persons in whom the property of the Company is vested as contemplated by that section. 18 B. 119 (131). N

(N.B.)—But whether or not the Directors can successfully plead the bar of limitation, they can defend themselves by a plea of staleness of demand, as for instance, where the liquidators having full knowledge of the facts since the Company went into liquidation, have filed the suit after the expiration of twenty-three years. 18 B. 119.

(10) **Suit for calls—Court having jurisdiction.**

A suit by the liquidator for calls is not a proceeding in winding-up and the Court in which it is instituted need not be a Court as defined in S. 130, *supra*. See, 9 Bom. L.R. 825. O

(11) **Calls made by foreign Court, when enforceable in India.**

(a) The Courts in India treat a call-order made by the Court of Chancery in England upon a contributory of a Company registered in England, and being wound-up under the authority of the Court of Chancery as a foreign judgment and will not allow the liability of defendant sued upon such order to be disputed unless it be shown that the Court had no jurisdiction to make the order, or that the defendant had no notice of it, or that it is not in the nature of a final order. 8 Bom. O.C. 200. See, also, 9 B. 346. P

(b) But where Courts in British India are called upon to give effect to a foreign judgment, they should insist upon a strict proof of the validity and service of summonses and other processes alleged to have emanated from the foreign Court and made a foundation for a liability to be enforced here by Courts that have no cognizance of the case on its merits. 11 B. 241. Q

(c) It is a leading principle of the English law, always understood, except when expressly excluded, that a person proceeded against in a Court must have due notice of the proceeding. Failing such notice, he is entitled to protection if the judgment or order consequently obtained in his absence, is made the ground of a suit in any Court governed by English principles. 5 B. 223. R

(d) For purposes of substituted service, care must be taken to find out the last known places of abode of the alleged contributory and to effect the service there. The address or residence of a member of the company entered in the register of shareholders, although sufficiently ascertained for the purpose of communication from the company, is not, therefore, ascertained for a service of legal proceedings. (*Ibid.*) S

(12) **Personal order against liquidator for costs.**

(a) If the liquidator brings or defends an action, in the name of the Company and not in his own name, and fails, he cannot be ordered personally to pay the costs of his opponent. The costs should be directed to be paid out of the estate. See, *Fraser v. Brescia Trams*, 56 L. T. 771. T

N.B.—If the Company be the plaintiff and it appears that if the defendant be successful the company will be unable to pay the costs, the defendant may apply for security under S. 93.

1.—“To bring....on behalf of the company”—(Continued).

N.B.—But, if the Company be the defendant, the plaintiff in bringing an action against a Company in liquidation, takes the risk of not recovering his costs. See *Emden's Winding up of Companies*, 8th Ed., p. 277; *Buckley*, 9th Ed., p. 368.

(b) As regards applications in the winding-up if the liquidator applies in his own name and not in the name of the Company, and fails, the order for costs will be against him personally but without prejudice to his right to apply for payment of such costs out of the assets. *Houns-low Brewery*, (1896) W.N. 45; *powell & Sons*, (1896), 1 Ch. 681; *Cf. Official Manager of Grand Trunk Railway v. Brodie*, 9 Hare. 823=3 D.M. & G. 146; *Official Manager of Consols Insurance, v. Wood*, 2 Dr. & Sm. 353=13 W.R. 492. See, also, *Sichell's case*, 3 Ch. 119, 124; *Campbell's case*, 4 Ch. D. 470, 475; *Caldwell v. Ernest*, 27 Beav. 39. U

N.B.—In *Bentley's case*, 12 Ch. D. 850, 851, a personal order for costs against the liquidator was refused. But *Buckley* says the point was not argued, and as the assets are in general sufficient, an order for payment out of assets is not objected to. See *Buckley*, 9th Ed., p. 369.

(c) Where the liquidator is respondent to an application which has succeeded, there will be no personal order against him for costs and the Court will direct the costs of the applicant to be paid out of the assets, *Salisbury Jones' case*, (1895), 1 Ch. 333, *overruling Staffordshire Co.*, (1893), 3 Ch. 523; see, also, *Marseilles Railway, Small Page's case*, 30 Ch. D. 598. But see, *Western Counties Co.* (1897), 1 Ch. 617, 632, where there was a personal order against the liquidator. V

(d) If the liquidator appeals from a decision in the winding-up, and the appeal is dismissed, the order will be that the liquidator do pay the costs. *E. P. Cambrian Steam Packet Co.*, 4 Ch. 112, 117; *E.P. Littledale*, 9 Ch. 257, 262; *Orgill's case*, 21 L.T. 221. W

N.B.—The intention in such case is that he is to pay the costs whether he is or is not able to get them paid out of the assets. *Ferrao's case*, 9 Ch. 355.

(e) If the liquidator be respondent to the appeal and also respondent to the application in the lower Court, and the appeal succeeds, the costs of the appellant will be directed to be paid out of the estate. The liquidator will not be personally liable for costs of the appeal or the costs in the lower Court. *Salisbury Jones' and Dub's case*, (1895), 1 Ch. 333, *overruling Staffordshire Gas Co.* (1893), 2 Ch. 523. See, also, *Marseilles Railway Small Pages' case*, 30 Ch. D. 598. X

(f) A liquidator who desires to appeal should, in order to be safe as to costs, apply for leave to appeal to the judge in the winding-up. See *Emden's Winding-up of Companies*, 8th Ed., p. 278, *Buckley*, 9th Ed., p. 370. Y

(g) *Jessel M.R.* stated that it was his practice to grant leave if he thought the case a proper one for appeal; if not proper, he would direct the application for leave to stand over until the result of the appeal was known. If a liquidator appealed without leave and the appeal failed, he would, as a general rule, refuse costs. *City and County Investment Trust*, 13 Ch. D. 475, 483; *Silver Valley Mines*, 21 Ch. D. 381, 389. Z

1.—“To bring....on behalf of the company”—(Concluded).

(13) Liquidator's costs when payable out of the estate.

- (a) Where a liquidator who has incurred a personal liability in respect of the costs of an action or application, applies to be allowed out of the estate such costs and also his own costs, the Court should consider whether the proceedings in which the costs were incurred were proper or not, and in determining this question the Court shall take into consideration the fact that the liquidator is a paid agent bound to discharge his duties with reasonable care and skill, and may disallow the costs for any mistake which would not disentitle an ordinary gratuitous trustee to costs. *Silver Valley Mines*, 21 Ch. D. 381; *Reynes Park Club*, (1899), 1 Q.B. 961; *Cf. E.F. Harper*, 20 Ch. D. 685. **A**
- (b) If the proceeding be in the Court which has control over the winding-up, the judge may determine at once as between the liquidator and the estate whether to allow the costs out of the estate or not, and if he think proper to allow them and the adverse litigant (there being sufficient assets) does not object, then, commonly the order is for payment, not by the liquidator personally, but out of the estate. *Buckley*, 9th Ed., p. 369. **B**
- (c) But the Court of appeal would not decide whether the liquidator's costs shall be allowed out of the estate or not. *Silver Valley Mines*, 21 Ch. D. 381, 387, 392. **C**

(14) Appeal as to costs.

The liquidator can appeal against an order refusing to allow him costs or ordering him personally to pay the costs of the adverse litigant. *Silver Valley Mines*, 21 Ch. D. 381; *Reynes Park Golf Club* (1899), 1 Q.B. 961. **D**

2.—“To carry on....of the same.”

(1) “Necessary” meaning of.

The word “necessary” in the section means more than “merely beneficial;” it does not denote an absolutely compelling force, but includes mercantile necessity or what is “highly expedient.” *Wreck Recovery Co.*, 15 Ch.D. 353=43 L.T. 190. **E**

N.B.—In determining whether a business is necessary for the beneficial winding-up of the Company the Court will have a proper regard to all the circumstances of the case. (*Ibid.*)

(2) Business not necessary for the beneficial winding-up instances.

- (a) A business whose object is merely to make a profit for the Company is not a business necessary for the winding-up, and cannot be sanctioned. See *E. P. Emmanuel* (1881), 17 Ch. D. 35; *E. P. Cooks*, 21 Ch. D. 397. **F**
- (b) Where a share-holder who believed in the value of the Company's patents, made a contract with the liquidator whereby he was to have the use of the plant of the Company to raise three sunken vessels at his own expense, the profits, if any, to go to the Company, the contract was held bad. *Re Wreck River Co.* (1880), 15 Ch. D. 353. **G**
- (c) A liquidator cannot bind the Company by a new contract to pay the depositors an increased rate of interest. *East of England Banking Co.*, 6 Eq. 368=4 Ch. 14. **H**

2.—“To carry on . . . of the same”—(Concluded).

N.B.—This was the case of a Company that was being wound up subject to supervision, but the liquidators of such Companies have the same powers as are given to official liquidators by this section. See Ss. 195 and 177 (g), *infra*. I

(3) Completion of contracts entered into before winding-up.

(a) The completion of contracts made before the winding-up, is within the section. *British Waggon Co. v. Leab*, 5 Q.B.D. 149. J

(b) Thus, where a Company had leased railway waggons for a term of three years upon terms that they should repair them, the continued performance of the contract after the Company had gone into liquidation was held to be within the corresponding section of the English Act. (*Ibid.*) K

(4) Contract not required for beneficial winding-up, legality of.

The section does not render illegal a contract not required for the beneficial winding-up, as between the Company and the person with whom it was made, though it may be open to objection as between the shareholders and the officers. *Bateman v. Ball*, 56 L. J. Q. B. 291. L

(5) Contracts in the ordinary course of business—Onus of proving necessity.

Contracts which are entered into by the liquidator and which fall within the ordinary business of the Company are presumed to be for its beneficial winding-up, and the burden of proving that they are not so, lies on those who object to it. *Hire Purchase Co. v. Richens*, 20 Q. B. D. 387. M

(6) Costs of carrying on business how payable.

(a) Debts incurred by the liquidator in carrying on the business of the Company must be paid in full; they are not merely provable. See *International Marine Co.*, 28 Ch. D. 420; see, also, S. 158, *infra* and notes thereto. N

(b) But such costs are not generally payable in priority to debenture-holders, where they have not been consulted as to the business, as costs of preservation. See *E. P. Grissel*, 3 Ch. D. 411; see, also, *Ormerod Grierson Co.*, 1890, W. N. 217. O

(7) Liquidator when personally liable for expenses incurred in business.

If in carrying on the business the liquidator has guaranteed payment, e.g., of wages of employees, he can be sued and the Court will not restrain the bringing of actions against him. *Original Hartlepool Collieries Co.*, 51 L. J. Ch. 508. P

(8) Dealings by liquidator for personal benefit.

A liquidator should not with a view to make a profit, lend or otherwise advance moneys that have come into his hands as liquidator. *Re Anon*, 15 L.T. 170, cited in *Buckley*, 9th Ed., p. 373. Q

(9) Liquidator whether liable for felonious acts of his servants.

A liquidator is not liable for loss occasioned by the felonious acts of his servants provided they were properly selected and employed. *Jobson v. Palmer*, (1893), 1 Ch. 71. R

3.—“To sell....private contract.”

(1) Sale of things in action.

The corresponding provision of the English Act (S. 151 (2) (a) of the Consolidation Act) authorises the Court to give sanction to the liquidator “to sell the real and personal property, and things in action of the Company,” and it has been held that a claim against the directors for misfeasance is a thing in action which the liquidator can sell with the sanction of the Court. See *Park Gate Waggon Co.*, 17 Ch. D. 234. S

The Indian Act does not expressly provide for the sale of ‘things in action’, and it is doubtful whether the power of the Court to give sanction for the sale of the immoveable and moveable property of the Company includes a power to sanction the sale of such a claim as is referred to above.

(2) Sale of lease subject to covenant against alienation.

Under this clause the Court can give sanction to the liquidator to sell a lease held by the Company in spite of a covenant against alienation with out the consent of the lessor. Such a covenant would not affect assignments by operation of law or assignments authorized by statutes. Covenants against alienation referred to in Ss. 11 and 12 of the Transfer of Property Act relate only to transfers by act of parties. The power of the Court under this clause to sanction a sale, overrides a private contract against assignment by the parties. 12 A. 193=10 A. W. N. 71. T-U

4.—“To prove....separate creditors.”

Bankrupt contributory—Right to set off.

- (a) If a contributory who is also a creditor of the Company becomes insolvent after the commencement of winding-up, the debt must be set-off against the calls, whether the claim is made in the bankruptcy or in the winding-up. *In re Dinkworth*, 2 Ch. 578, *E.P. Cooper*, 15 L.T. 637, *E.P. Strang*, 5 Ch. 492. See, also, *E.P. Morton*, 17 W.R. 606=38 (L.J.) Ch. 390, *Auriferous Properties*, 1 Ch. 691. Y
- (b) But no set-off is allowed if the insolvent contributory is a Company in liquidation holding shares in another Company in liquidation. *Auriferous Properties* (1893), 1 Ch. 691. W

5.—“To draw, accept....on behalf of the Company.”

Sanction to negotiate bills.

- (a) In granting or refusing sanction to deal with bills the Court will consider whether the dealing would or would not operate to prejudice the estate, and whether it would tend to facilitate the main object of the Act namely, the collection and distribution of the assets for the benefit of the general body of the creditors. See *Smith, Fleming & Co's case*, 1 Ch. 539, 545. X
- (b) Where a Company held bills accepted by A payable six months hence, and A held dishonoured acceptances of the Company, the liquidator was allowed to negotiate A's bills, for, A had no present right of set-off, and no right to have the bills retained by the liquidator until a right of set-off arose. (*Ibid.*) See, also, *Gledstones & Co's case*, 1 Ch. 538. Y
- (c) But if a Company before winding-up enters into a contract for payment for goods by acceptances, the Court will not give sanction to the liquidator in the winding-up to pay for goods supplied by Company acceptances which would be worth nothing. The vendor would in such case be allowed to prove for damages. *Ebbu Vale's Co's claims*, 8 Eq. 14. Z

6.—“To raise upon the security...sums of money.”

(1) Assets include realized assets.

The term assets in cl. (f) includes the realized assets of a Company divided among the share-holders in pursuance of a resolution. 14 C. 31. A

(2) Borrowing money on security of assets generally.

When a liquidator borrows money on the security of the assets of the Company, the borrowing need not be on mortgage or pledge or charge of specific property, but may be on the security of the assets generally. 18 C. 31 (36). B

(3) Company's liability to creditor for money borrowed by liquidator.

Where the liquidator borrows money for the purposes of the Company and applies it to these purposes, the lender is entitled to recover the money from the Company, for, it is a well established law that a person who has made a contract with the agent may, if and when he pleases, look directly to the principal unless by the terms of the contract he has agreed not to do so, and that, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. See *per Petheram, C.J.* in 18 C. 31, following *Calder v. Dobell*, L.R. 6 C.P. 486. C

7.—“To take out...deceased contributory.”

Letters of administration need not be taken before settling list of contributories.

There is no obligation on the part of an official liquidator to take out letters of administration to the estate of a deceased share-holder before settling the list of contributories. 20 B. 654. D

145. The Court may provide by any order that the official

Discretion of
official liquidator.

liquidator may exercise any of the above powers without the sanction or intervention of the Court and where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

(Notes).

General.

Corresponding English Law.

The first part of this section corresponds to sub-S. 4 and the latter part to sub-S. 5 of S. 151 of the English Companies (Consolidation Act of 1908). Sub-S. 4 applies only where the winding-up is in Scotland or Ireland and provides for orders enabling official liquidators to exercise the powers conferred by S. 151 except the power of appointing a solicitor or law agent, without the sanction or intervention of the Court. E

N.B.—As to the powers of provisional liquidators, see notes to S. 144, *supra*.

146. The official liquidator may, with the sanction of the Court,

Appointment of
attorney or vakil to
official liquidator.

appoint an attorney or vakil to assist him in the performance of his duties. Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 151, sub-S. (1), clauses (c) and (d), of the English Companies Consolidation Act of 1908. F

Cl. (c) applies where the winding-up is in England, and empowers the liquidator with the sanction of the Court or of the committee of inspection to employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself, but the sanction must be obtained before employment, except in cases of urgency and in those cases it must be shown that no undue delay took place in obtaining the sanction.

Cl. (d) applies where the winding-up is in Scotland or Ireland and provides that the liquidator has power with the sanction of the Court to appoint a solicitor or law agent to assist him in the performance of his duties.

The English Act contains no provision corresponding to the proviso to this section. Nevertheless, it is a well established rule of English Law that if the liquidator is a solicitor, the appointment of his partner will not be sanctioned unless he consents to act without remuneration. See *Re Universal Private Telegraph Co.* (1870) 19 W.R. 297. G

I.—“The official liquidator....duties.”

(1) Sanction to appoint attorney or vakil.

A liquidator who wants to appoint an attorney or vakil must obtain the sanction of the Court under this section. A sanction under S. 144, *supra*, to bring or defend a suit does not include a sanction to appoint an attorney or vakil. See *London Metallurgical Co.*, (1897) 2 Ch. 262. H

(2) Attorney's costs, priority of.

If the assets are insufficient to pay the costs of the attorney and the costs of the winding-up in full, the attorney's costs are entitled to priority. *Home Investment Soc.* 14 Ch. D. 167; *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33, *not following*. *Dronefield Silkstone Co.*, 23 Ch. D. 511. I

(3) Liquidator not personally liable for attorney's costs.

(a) An attorney appointed by the liquidator cannot make him personally liable for his (attorney's) costs in the winding-up. *Anglo-Moravian Co.*, *E.P. Walkin*, 1 Ch. D. 130. J

(b) The attorney gives credit to the assets, and if the assets are not sufficient, he must lose the difference. (*Ibid.*) K

(c) The position of the attorney is quite different from that of an adverse litigant. The latter has nothing to do with the sufficiency of assets, while the attorney has contracted to act for the Company with recourse to the assets for payment. (*Ibid.*) L

N.B.—The same rules apply in the case of an attorney appointed by a voluntary liquidator. *Trueman's Estate. Hooke v. Piper*, 14 Eq. 278. M

Ordinary Powers of Court.

147. As soon as may be after making an order for winding-up the Company, the Court shall settle a list of contributories ¹, with power to rectify the register of members in all cases where such rectification is required in pursuance of section 58 ², and shall cause the assets of the Company to be collected and applied in discharge of its liabilities existing at the date of the said order ³.

(Notes).

General.**Corresponding English Law**

This section corresponds to S. 163, sub.S. (1) of the English (Companies Consolidation) Act of 1908.

The words "existing at the date of the said order," that are found at the end of the section are not contained in the corresponding section of the English Act. N

*1.—"As soon as . . . a list of contributories."***(1) List of contributories—A. & B. lists.**

The list of contributories consists of two parts: a list of persons who are members at the commencement of winding-up, called the A list, and a list of those who have ceased to be members within one year before the commencement of winding-up, called the B list. See S. 61, *supra*, and notes thereto. O

(2) Settling list of contributories and enforcement of calls—Difference between voluntary and compulsory winding-up.

There is a very great distinction between settling the list of contributories and making calls in a compulsory and in a voluntary winding-up. In the former case an order made upon a contributory under S. 151, for a call, is, subject to the provision for appeal, conclusive evidence that the money is due. (See S. 155). Whereas in a voluntary winding-up, the list of contributories settled by the liquidator is under S. 177 (h) only *prima facie* evidence of the liability of the persons named therein to be contributories.

Again in a compulsory winding-up, an order for a call may, by virtue of S. 166, be enforced by execution, whereas in the case of a voluntary winding-up a call made by the liquidator can be enforced only by an application to the Court under S. 182, or by an action. See *Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175, 187. See, also, *London Bank of Scotland*, W.N. (1867), p. 114. P

(3) Re-settlement of list after rectification.

Where the register of members is rectified after the commencement of winding-up, the Court may re-settle the list, *Onward Building Society*, (1891) 2 Q.B. 463. Q

2.—“With power...section 58.”

(1) Rectification after winding-up—Whether governed by S. 58.

The power of rectification given by S. 58, *supra*, is not determined by winding-up. After winding-up, the Court may rectify the register under S. 58 and the present section. See *Sussex Brick Co.*, (1904), 1 Ch. 598; *Brechenridge's case* 2 H. & M. 642; *Reese River Mining Co. v. Smith*, L.R. 5 H.L. 64, 80; *Ward and Henry's case*, 2 Eq. 226 = 2 Ch. 431. R

N.B.—After winding-up, the power of rectification is not restricted to rectification only for purpose of settling the list of contributories. *Sussex Brick Co.*, (1904) 1 Ch. 598.

(2) Power of rectification, discretionary.

(a) The exercise of the power of rectifying the register is in the discretion of the Court, and if shares are transferred after the commencement of winding-up, the register will not be rectified except on strong grounds. *Onward Building Society* (1891), 2 Q.B. 463. S

(b) The reference made in this section to rectification does not mean that the Court can rectify the register *ex nro motu suo*, but means that the Court is to exercise the powers conferred by S. 58, having regard to who is the applicant and to all the circumstances of the case. *Sichell's case*, 3 Ch. 119. T

(c) In exercising the power the Court should consider the right, of creditors. *Preservation Syndicate*, (1895) 2 Ch. 768. U

(d) If necessary conditions may be inserted for the protection of the rights of third parties. *Sussex Brick Co.*, (1904) 1 Ch. 598. V

N.B.—The register is more readily rectified before, than after winding-up. See *Emden's Winding-up of Companies*, 8th Ed., p. 223.

(3) Adjournment of petition for rectification.

Under certain circumstances, the application for rectification of the register, if made after the commencement of winding-up, may be adjourned to be dealt with, when the list of contributories is to be settled. See *In re Scottish and Universal Finance Association, Bankridge's case*, 13 W. R. 677 = 12 L.T. 796. W

(4) Application by contributories to be taken off the list.

(a) If a person who has never agreed to become a member, has been registered as a share-holder the register may be rectified even after winding up, though no steps have been taken to obtain rectification before winding-up. *Gorriessen's case*, 8 Ch. 507; *Wynne's case*, 8 Ch. 1002; *Beck's case*, 9 Ch. 392. X

(b) Similarly, the register may be rectified after winding-up where the agreement under which a person has been registered is void. *Alabaster's case*, 7 Eq. 273; *Waterhouse v. Jamaieson*, 2 H.L. Sc. 29. Y

(c) But if the agreement is not void but only voidable, the member cannot have his name taken off the register after winding-up, unless he has avoided the contract or taken steps equivalent to it before the commencement of the winding-up, or before the Company stops payment and issues notices of a meeting to wind up. *Reese River Mining Co. v. Smith*, L.R. 4 H.L. 64; *Oakes v. Turquand*, L.R. 2 H.L. 325; *Mitchell's case*, 5 A.C. 548 and other cases cited in *Emden's Winding-up of Companies*, 8th Ed., p. 190. Z

2.—“With power....section 58”—(Continued).

N.B.—Even where the contract is void the right to rectification may be lost by delay and acquiescence. *E. B. Sandy's*, 42 Ch. D. 98; *Wynne's* case 8 Ch. 1002. **A**

N.B.—But, mere delay is no objection to rectification, especially where no loss is caused to the estate thereby. *Shervell's* case, 2 Ch. 387; *Fyfe's* case 4 Ch. 768; *Hart's* case, 6 Eq. 512; *Nelson's* case, 1874 W.N. 196. **A-1**

(5) Transferor applying to be taken off the list in the absence of transferee.

(a) “Where an alleged contributory contests his liability and asserts that by reason of a transfer or otherwise, some one else is liable in his stead, he ought, in general, to bring before the Court the person whose name, he says, ought to be substituted for his own.” *Buckley*, 9th Ed., p. 383. **B**

(b) “If I apply to have my name taken off the list of contributories on the ground that I was not the owner of the shares at the time that I was put upon the list, but had *bona fide* transferred them to somebody else, and that other person was my representative, then I must prove these facts unless they are admitted, and I can prove them only by having that other person in Court to have the fact established. It would be very different if there was an application to the Company to take the name off, on this ground—that everything has been completed between you and another person, and that your name had not been taken off by the Company by reason of their not performing some formal matter which it was requisite for them to do in order to give final completion to your contract.” Per *Lord Westbury* in *Thomas Brown's* case, (Eur. Arb.) L.T. 103=17 Sol. J. 289. **C**

N.B.—But the absence of the transferee is not a fatal objection to rectification, if the circumstances are such as to justify an order. See *Buckley*, 9th Ed., p. 383.

(c) Thus, where the transferee is, dead, and has no legal personal representative, and the transferor's name has been left on the register through the default of the Company, the transferor may have his name removed from the list although there is no one to be put on the list in his place. *Fyfe's* case, 4 Ch. 768. **D**

(d) An order for removing the name of the transferor from the list may also be made where the transferee cannot be found. See *Cornfield's* case, 1873 W.N. 186. **E**

(e) Where a person has his name removed from the list on the ground of an alleged transfer, the transferor's name will be replaced if the Court thinks that the transfer was fictitious. (*Ibid.*) **F**

N.B.—As to the circumstances in which the register may be rectified, see further, notes to S. 58, *supra*.

(6) Retrospective effect of rectification.

In a proper case the register may be rectified so as to give a retrospective effect to registration and validate an act done by a person as a member before he was registered as such. *Sussex Brick Co.* 1904, 1 Ch. 598.

(7) Application by Company, how made. **G**

If the Company is the applicant, the application for rectification must be made in the name of the Company, not of the liquidator. *E. P. Kintrea*, 5 Ch. 95, *Cf. E. P. Winterbottom*, 18 Q.B.D. 446. **H**

2.—“With power....section 58”.—(Concluded).

(8) Costs of application.

- (a) A person who unsuccessfully applies to have his name removed from the list, would, in the absence of special circumstances, have to pay costs of the contest. *Gower's case*, 6 Eq. 77; *Birbeck Life Assurance Co., Barry's Representative's case* 2 Dr. & Sm., 321=W.R. 380=5 N.R. 299; *Musgrave and Hart's case*, 5 Eq. 193; *Andrew's case*, 3 Ch. 161. I
- (b) The Court may however, if it thinks fit, make no order as to costs not only where a contributory unsuccessfully applies to have his name taken off the list, but also in cases where the liquidator successfully applies to put a person on the list. See *Gregg's case* 15 W.R. 82; *Purdey's case* 16 W.R. 660; *Mallorie's case* 15 W.R. 52=15 L.T. 236=36 L.J. (Ch.) 40; *Fletcher's case*, 16 W.R. 75=37 L.J. (Ch.) 49=17 L.T. 136. J
- (c) But the costs of an unsuccessful resistance by contributories will not be paid to them out of the estate. See *E.P. Oakes and Peck*, 3 Eq. 576, 633. K
- (d) An alleged contributory who succeeds in disputing his liability will, in a proper case, get his costs out of the estate. *Nation's case*, 3 Eq. 77; *Ship's case* 13 W.R. 450=12 L.T. 728; *Emmerson's case*, 2 Eq. 231=1 Ch. 435; *Coate's case*, 17 Eq. 169; *Lowe's case*, 9 Eq. 589. L
- (e) The liquidator's costs properly incurred will, if they are not payable by any party before the Court, be paid out of the estate. See notes to S. 144, *supra*. See, also, Buckley, 9th Ed., p. 384. 11 A. 349. M
- (f) Thus where the liquidator of a company made an application in good faith to place certain share-holders on the list of contributories, and the application was dismissed, the Court ordered the cost of each side to be paid as a first charge out of the estate. 11 A. 349. N

N.B.—Where the dispute is not between the liquidator and an alleged contributory, but between two persons, both equally solvent as to which of them is liable as a contributory, the liquidator should take no part in the dispute. *Musgrave and Hart's case*, 5 Eq. 193. N-1

(9) Appeal against an order on an application for rectification.

Though an order passed on an application for rectification of the register in the winding-up is an order under S. 53 read with the present section, still the order is one to which the limitation imposed by S. 169, *infra*, applies. An appeal against such order cannot be heard unless the notice provided by that section has been given. 27 A. 509. Cf. *Eliham Valley Dickson's case*, 12 Ch. D. 298. O

(10) Rectification by liquidator in winding-up under supervision.

It is doubtful whether the liquidator in a winding-up under supervision has power to rectify the register without the sanction of the Court. *Gilbert's case*, 5 Ch. 559. P

3.—“Shall cause....said order.”

(1) Assets of a Company wound up subject to supervision—Provisions as to distribution.

Where a Company is voluntarily wound up under the supervision of the Court the provision applicable as to the distribution of the assets among the creditors is that contained in the present section not S. 177. 55 P. W.R. (1907). Q

3.—“*Shall cause....said order*”—(Concluded).

(2) Mode of distribution among creditors.

Where a Company is being wound up and its assets are collected and distributed, all creditors take *pro rata*. 9 Ind. Jur. N.S. 394. R

(3) “Liabilities existing at the date of winding-up order.”

(a) The words mean liabilities valued at that date, whether secured or unsecured, and do not include future liabilities; interest subsequent to the order of winding up does not continue to be a charge on the assets and is payable only after all debts have been paid in full. 55 P.W.R. 1907. S

(b) The term ‘liabilities’ in this section is quite wide enough to include the claim in respect of a mortgage. 55 P.W.R. 1907. T

148. In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right, and persons who are contributories as being representatives of, or being liable to the debts of, others.

Provision as to representative contributories.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 163, Sub-S. (2), of the English Companies (Consolidation) Act of 1908. T

(2) Omission to place on the list representatives of deceased contributories.

There is nothing in S. 126, *supra*, or in the present section, which requires the official liquidator to place on the list all the persons who may, as representatives, be liable to contribute in discharge of the liability of a deceased share-holder. Nor can the liability, under that section, of a person who has been placed on the list as his personal representative be affected by the omission of the official liquidator to do so. 20 B. 654. U

149. The Court may, at any time after making an order for winding-up a Company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker or agent or officer of the Company¹ to pay, deliver, convey, surrender or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate or effects which happen to be in his hands for the time being, and to which the Company is *prima facie* entitled².

Power of Court to require delivery of property.

(Notes).

General.

(1) Corresponding English law.

This section corresponds to S. 164 of the English Companies (Consolidation) Act of 1908. U

General—(Continued).

(2) Scope of the section.

- (a) An order under the section can be made only against contributories and other persons mentioned therein ; the provisions of the section cannot be extended. *E.P. Hawkins*, 3 Ch. 787. **Y**
- (b) The section does not therefore apply to the executor of a deceased contributory or of any other person named in the section. *Felton's Executor's case*, 1 Eq. 219. **W**
- (c) Even as regards a person mentioned in the section, he cannot be proceeded against under the section, unless the money, property, books, papers, &c., sought to be recovered are held by him in his character or capacity of contributory, trustee, receiver, banker, or agent or officer of the Company, but not otherwise. *Hollingsworth's case*, 3 De. G & Sm. 102; *Cox's case*, 3 De. G & Sm. 180; *affirmed* 3 Mac. M.G. 754. **X**
- (d) Thus, a banker who holds money not as banker for, but adversely to the Company cannot be proceeded against under the section. *In re National Bank*, 10 Eq. 298. **Y**
- (e) If the Company's solicitor is paid more than what is due to him for his actual costs, the excess is only a debt and cannot be recovered under this section. *Hollingsworth's case*, 3 De. G & Sm. 754. **Z**
- (f) Similarly, money paid by the Company to a share-holder cannot be recovered under the section. *Cox's case*, 3 De. G & Sm. 180. **A**
- N.B.**—But in this case an order can be made under S. 150, *infra*, which however applies only to contributories or the estates of deceased contributories.

(3) Procedure where section inapplicable.

In cases to which the section does not apply the liquidator must bring an action in the name and on behalf of the Company. See S. 144 (a), *supra*. **B**

(4) Section to be construed liberally.

- (a) The Court would probably put a liberal construction on this section as on Ss. 150 and 214 in order to bring within the winding-up jurisdiction any question properly cognizable. See *Buckley*, 9th Ed., p. 385. **C**
- (b) In *Oakwell Collieries Co.*, (1879) W.N. 65, a director was ordered to deliver possession of a colliery which he had agreed to sell to the Company. **G-1**

(5) Application of the section to Companies in voluntary liquidation.

In the case of a Company in voluntary liquidation, the Court may exercise the powers under this section on the application of the liquidator or a contributory. See S. 182, *infra*. **D**

(6) *Ex parte* orders under the section not to be passed as a matter of course.

- (a) *Ex parte* orders are not to be passed as a matter of course where proceedings are taken under this section. Such orders should be granted with the greatest caution and where rapid action is desired, it is always possible under the rules of the Court to serve with leave short notice of any application to the Court. 6 Bom. L.R. 790 (795). **E**

General—(Concluded).

- (b) An *ex parte* order will not be made for the delivery of documents by the manager of a Company to the official liquidator. *Commercial Union Wine Co.*, 35 Beav. 35. F

N.B.—In the conditions which prevail in India the passing of *ex parte* orders involving the person affected in serious liability is much to be deprecated. *Per Jenkins, C.J.*, in 6 Bom. L.R. 790 (795).

1.—“Any contributory....Officer of the Company.”

(1) Order against fully-paid share-holder.

A holder of fully paid shares in a limited Company cannot be placed on the list of contributories without his consent and the section does not apply to him if he objects to be placed on the list. See *Mariborough Club Co.*, 5 Eq. 365; *Leitch's case*, 1 Eq. 231; *Hodge's Distillery Co.*, 6 Ch. 51. G

(2) Section inapplicable to constructive trustees.

- (a) The word “trustee” in the section does not include a constructive trustee. *United English and Scottish Assurance Co.*, *E. P. Hawkins* (1868) 3 Ch. 787. *Hollingworth's case*, 3 De. G. & Sm. 102. H

- (b) A creditor who, after the commencement of winding-up, has obtained payment of the money of the Company under a garnishee order is not a “trustee” within the section and the section does not apply to him. *United English and Scottish Assurance Co.*, *E. P. Hawkins*, 3 Ch. 787. See, also, *Hollingworth's case*, 3 De. G. & Sm. 102; *Cox's case*, 3 De. G. & Sm. 180. I

2.—“Any sum....prima facie entitled.”

(1) Property ordered to be delivered must belong to the Company.

- (a) The property sought to be recovered must be shown to be property belonging to the Company. *Imperial Land Co. of Marseilles, Re National Bank* (1870) L.R. 4 Eq. 298; &c. J
- (b) As against the liquidator, a receiver for debenture-holders, is not entitled to the custody of such books and documents of the Company as relate to its management and business, and are not necessary to support the title of the debenture holders. *Engel v. South Metropolitan Brewing Co.*, (1892) 1 Ch. 442. K
- (c) The Court will, therefore, order the receiver to deliver the custody of such books and documents to the liquidator on his undertaking to produce them when required. *Engel v. South Metropolitan Brewing Co.*, 1 Ch. 442; see, also, *Re Clyde Tin Plate Co.*, 47 L.T. (N.S.) 439. L

(2) Property subject to lien cannot be ordered to be delivered.

- (a) The liquidator is not entitled to the possession of those documents on which the Company's solicitor has acquired a valid lien before the commencement of the winding-up. An order to deliver possession of such documents cannot be made. See *Capital Fire Insurance Association*, 24 Ch. D. 408; *Engel v. South Metropolitan Brewing Co.*, (1892) 1 Ch. 442. M
- (b) An agent who is in possession of properties belonging to a Company under an agreement by which he was to advance moneys for working expenses has, in the absence of a contract to the contrary, a lien on such

2.—“Any sum . . . *prima facie* entitled”—(Concluded).

properties under S. 221 of the Contract Act for the amount disbursed by him, and S. 149 of the Companies Act does not authorize the Court to deprive the Agent of the possession of his security. 11 M 123=3 N
M.L.T. 274.

- (c) The making of a winding-up order will not affect his right to continue in possession and make the necessary disbursements as long as his possession continues, and as regards such disbursements he will also have the same lien as in respect of disbursements made before winding-up. (*Ibid.*) O

- (d) If the Court orders the property to be delivered to the liquidator without prejudice to the agent's rights, if any, and the property is sold, the agent will be entitled to a first charge on the proceeds of the sale for the amount due to him. (*Ibid.*) P

(3) Production of documents subject to lien.

Where the documents of the Company are subject to a lien, the Court may without prejudice to the lien, order the production of the documents, and allow the liquidator to inspect them. See S. 162, *infra*; also *South Essex Estuary Co., E.P. Pavier and Layton*, 4 Ch. 215. Q

(4) Power of Court to direct payment into Bank.

Under S. 152, *infra*, the Court may order any contributory or other person from whom money is due to the Company to pay the same into the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to the account of the official liquidator instead of the liquidator himself. R

150. The Court may, at any time after making an order for winding-up the Company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the Company, exclusive of any moneys which he, or the estate of the person whom he represents, may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act ¹.

Power of Court to order payment of debts by contributory.

The Court may, in making such order, when the Company is not limited, allow to such contributory, by way of set-off, any moneys due to him or the estate which he represents from the Company on any independent dealing or contract with the Company, but not any moneys due to him as a member of the Company in respect of any dividend or profits ²:

Provided that, when all the creditors of any Company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the Company may be allowed to him by way of set-off against any subsequent call or calls.

In the event of the winding-up of any limited Company; the Court, if it thinks fit, may make to any director or manager of such Company whose liability is unlimited the same allowance by way of set-off as under this section it may make to a contributory where the Company is not limited.

(Notes).

General.

(1) **Corresponding English Law.**

This section corresponds to S. 165 of the English Companies (Consolidation) Act of 1908. S

(2) **Object of the section.**

"The object of this and like sections is to avoid a double process, and to do complete justice in the winding-up. It is only in rare instances (as where some of the parties concerned are not amenable to the jurisdiction in the winding-up) that an action should be brought instead of making use of the jurisdiction given by the section." See Buckley, 9th Ed., p. 389. T

1.—"Make an order....of this Act."

(1) **Holders of fully paid shares, whether contributories.**

A holder of fully paid shares cannot be placed on the list of contributories without his consent. If he is indebted to the Company, and does not like to be placed on the list, the debt can be recovered only in an action. The Court cannot place him on the list merely to bring him within the summary jurisdiction of this section. *Marlborough Club Co.*, 15 Eq. 365; *Cf. Schroder's case*, 11 Eq. 181, 184, 198. U

N.B.—S. 151, *infra*, confers on the Court the power to make calls upon contributories.

(2) **Orders under the section—Instances.**

(a) Under this section the Court can enforce the payment of calls made by the Company before the commencement of winding-up. See *United Service Association*, (1901) 1 Ch. 97. Y

(b) Under this section and S. 214, *infra*, a director or a contributory may be required to re-pay the amount of any dividend or bonus paid by him under a delusive and fraudulent balance sheet. See *Mercantile Trading Co.*, *Stringer's case*, 4 Ch. 475; *Rane's case*, 6 Ch. 104. See, also, S. 214, *infra*. W

N.B.—Where an action instituted by the Company is abandoned by the liquidator on proceedings being taken under this section, the costs of the action will be deducted from any sum recovered by the liquidator. See *United Service Association*, (1901) 1 Ch. 97.

2.—"Allow to such contributory....profits."

(1) **Power to allow set-off discretionary.**

The section confers on the Court a discretionary power in allowing set-off, and if the claim against the Company requires investigation, the Court may order the payment of the money due from the contributory without waiting until the cross claim is investigated. *Brasnett's case*, (1884) W.N. 175. X

2.—“Allow to such contributory . . . profits” —(Continued).

(2) Contributory of a limited Company not allowed to set-off.

(a) A contributory of a limited Company cannot in the winding-up set off against a call (whether made in the winding-up or before the winding-up) a debt due to him from the Company or any dividend which may after the date of the call come to him on his debt. *Grissell's case*, 1 Ch. 528; *Calisher's case*, 5 Eq. 214; *Barnett's case*, 19 Eq. 449; see, also, *Black & Co.'s case*, 8 Ch. 254; *Whitehouse & Co.*, 9 Ch. D. 595 as corrected in *Re Pyle Works*, 44 Ch. D. 534. Y

(b) The reason why a set-off is not allowed is that the moment the winding-up takes place the whole administration is carried on with a view to the payment of the debts of the creditors *pari passu*, and the liquidator receives the calls, whenever made, as statutory trustee for the equal and ratable payment of all the creditors, and to allow a set-off would be inconsistent with the main principle of winding-up. *Black & Co's case*, 8 Ch. 254. Z

(c) The contributions under Ss. 61 and 62, *supra*, including calls made before as well as after winding-up are not debts due to the Company but are contributions to the assets enforceable by the liquidator for the benefit of creditors. As it is the liquidator that enforces the calls, while it is not the liquidator but the Company that owes the debt, there is no right of set-off under the general rules of set-off. Nor is such right conferred by any of the provisions of the Company's Act. See *Buckley*, 9th Ed., p. 386. A

(d) The contributory cannot claim a right of set-off, even by a special agreement, for, a Company cannot contract with one of its share-holders so as to give him, in substance, a right, in the event of winding-up, to be paid out of his own calls in preference to other creditors. See *Black & Co.'s case*, 8 Ch. 254.

N.B.—“Whether in the adjustment of the rights of contributories among themselves the contract holds good is another matter.” *Buckley*, 9th Ed., p. 387.

N.B.—*Buckley* says that after the decisions in *Black & Co's case*, and *Whitehouse & Co.*, *supra*, the case of *Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175 may be treated as overruled. See *Buckley*, 9th Ed., p. 386. B & C

(e) Even where an action for a call is commenced by the Company and a set-off is pleaded before the commencement of winding-up, the set-off will not be allowed if the Company goes into liquidation before judgment. *Hiram Maxim Lamp Co.*, (1903) 1 Ch. 70. D

(f) The rule which excludes set-off is not affected by the fact that the contributory is dead and his estate is insolvent. Payment of a debt due to the estate cannot be claimed or asked before the calls have been fully paid. See *West Hartlepool Co.*, *Gunn's case*, 38 L.T. 139. E

(g) The rule of exclusion applies also where the contributory is an insolvent Company in liquidation. The exception in the case of a bankrupt contributory does not extend to a Company in liquidation holding shares in another Company in liquidation. *Auriferous Property*, (1898) 1 Ch. 691. F

2.—“Allow to such contributory... profits”—(Concluded).

N.B.—The rules as to set-off are the same whether the winding-up is voluntary, under supervision, or compulsory. (*Ibid.*) See, also, *Hoby & Co. v. Birch*, 59 L.J.Q.B. 247=62 L.T. 404.

N.B.—In an action by a voluntary liquidator for calls, the defendant cannot counterclaim for debt or damages. *Government Security Co. v. Dempsey*, 50 L.J. (C.P.) 199.

(3) Set-off when allowed to contributory of unlimited Company.

(a) In the case of an unlimited Company a set-off may be allowed of debts due from the Company to the contributory (as distinguished from moneys due to him as a member) against that which under this section the Court can order him to pay, that is, debts due from the contributory and calls made before the winding-up. See *Buckley*, 9th Ed., p. 387, also at p. 388. G

(b) A contributory will not be allowed to set-off a debt due to him from the Company against a call made in the winding-up. See *the decision of Fry, J. in West of England E.P. Bramwhite*, (1879) W.N. 86=27 W.R. 646. H

N.B.—The decision of *Malins v. C.* in *Gibbs and West's* case, 10 Eq. 312, that in an unlimited Company a set-off may be allowed against calls in the winding-up, cannot stand with the principles in *Whitehouse & Co.*, 9 Ch. D. 595, 606, and in *West of England Bank E.P., Bramwhite*, (1879) W.N. 86; *Fry, J.*, refused to follow it.

N.B.—Money due to a member in respect of a dividend or profit shall not be deemed to be a debt due to him in case of a competition between himself and any other creditor not a member, though it may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves. See S. 61 (g), *supra*.

151. The Court may, at any time after making an order for winding-up a Company, and either before or after it has ascertained the sufficiency of the assets of the Company, make calls on, and order payment thereof by, all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the Company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves ¹.

Power of Court to make calls.

The Court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 166 of the English Companies (Consolidation) Act of 1908.

1.—“*Make calls....themselves.*”(1) **Director's power to make calls.**

After a winding up order directors have no power to make calls. *Fowler v. Broad's Patent Night Lights Co.*, (1898) 1 Ch. 724. **J**

(2) **Partly paid shares allotted as fully paid—Effect of *bona fide* purchase.**

Where shares which, for want of a registered contract or for any other reason, must be treated as unpaid are allotted to a person, and the allottee subsequently transfers the same to a person who, acting upon the faith of the certificate issued by the Company to the transferor, in good faith believes the shares to be paid up, and gives valuable consideration for the same, the transferee is entitled to hold them as fully paid

Quære, Whether the transferor can be made a contributory and be compelled to pay calls on those shares. See *Spargo's* case, 8 Ch. 407, 410, 413.

(3) **Calls for payment of estimated debts.**

The expression “debts and liabilities” in the section means estimated debts and liabilities. The Court can, therefore, make a call at any time after the commencement of winding-up, for payment of the estimated debts of the Company though the claim of the creditors may be disputed. It need not wait till the claims of the creditors are established. *Contract Corporation*, 2 Ch. 95. *Barned's Banking Co.*, 36 L.J. (Ch.) 215. **L**

(4) **Quantum of call, appeal against.**

The Court of Appeal will not in the absence of strong grounds, interfere with the discretion of the Court below as to the *quantum* of a call made in the winding-up. (*Ibid*). **M**

N.B.—As to the extent of the liability of several contributories in a winding-up, see Ss. 61 and 62, *supra*, and notes thereto.

(5) **Agreement for payment of calls in instalments, not enforceable in winding-up.**

An agreement between a member and a Company for payment of calls in instalments will be enforceable only so long as the Company is a going concern, and will not bind the Court after the winding-up, a call may be made for the immediate payment of the whole amount due on a share, in spite of such agreement. *Cordova Union Gold Co.*, (1891) 2 Ch. 580; *Cf. Fowler v. Broad's Night Light Co.*, (1898) 1 Ch. 724. **N**

(6) **Resistance to calls.**

(a) Persons who are on the register at the commencement of winding up cannot oppose a call on the ground that their names ought to be removed. Their remedy is to apply for the suspension of the call as against themselves. *Barned's Banking Co.*, 36 L.J. (Ch.) 215. **O**

(b) A call or other proceeding taken under a winding-up order cannot be resisted on the ground that the winding-up order is invalid. No objection can be taken to the validity of the winding-up order in any subsequent proceeding taken under the order. The winding-up order must be taken to be valid until discharged. *Arthur Average Association*, 3 Ch. D. 522; *Arthur Average Association, E.P. Hargrove & Co.*, 10 Ch. 542; *London Marine Insurance*, 8 Eq. 176; *Padstow Association*, 20 Ch. D. 145; *Strick v. Swansea Tin Plate & Co.*, 36 Ch. D. 558; *Sunderland Building Soc.*, 21 Q.B.D. 349; *Overend, Gurney & Co., E.P. Oakes*, 16 L.T. 148=36 L.J. (Ch.) 413. **P**

1.—“ Make calls....themselves” — (Concluded).

(c) Thus, it is no answer to a call made in the winding-up that the Company was an illegal association, and that the order to wind it up was made without jurisdiction. *Arthur Average Association*, 3 Ch. D. 522; see, also, *Orend Gurney & Co., E.P. Oakes*, 16 L.T. 148. **Q**

N.B.—But a winding-up order is not a judgment *in rem*, and does not preclude a stranger to the winding up from disputing its validity. *Bowling's Contract* (1895), 1 Ch. 668.

(7) Call order, how enforced.

An order for a call made by the Court under this section can, by virtue of S. 166, *infra*, be enforced by execution. See *Brighton Arcade Co. v. Dowling*, L.R. 3 C. P. 175. **R**

152. The Court may order any contributory, purchaser, or other person from whom money is due to the Company to pay the same into the Bank of Bengal, the Bank of Madras or the Bank of Bombay, as the case may be, or any branch thereof respectively, to the account of the official liquidator instead of to the official liquidator; and such order may be enforced in the same manner as if it had directed payment to the official liquidator.

Power of Court to order payment into Bank.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 167 (1) of the English Companies (Consolidation) Act of 1908, with this difference, *viz.*, that instead of the words “ *the Bank of Bengal, the Bank of Madras or the Bank of Bombay*” the English Act contains the words “ *the Bank of England*.” **S**

153. All moneys, bills, hundis, notes and other securities paid and delivered into the Bank of Bengal, the Bank of Madras or the Bank of Bombay, or any branch thereof respectively, in the event of a Company being wound up by the Court, shall be subject to such order and regulation for the keeping of the account of such moneys and other effects, and for the payment and delivery in, or investment and payment and delivery out, of the same as the Court may direct.

Regulation of account with Court.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 167 (2) of the English Companies (Consolidation) Act of 1908, which provides that “ all moneys and securities paid or delivered into the Bank of England or any branch thereof in the event of a winding-up by the Court shall be subject in all respects to the orders of the Court.” **T**

154. If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the property of such deceased contributory, whether moveable or immoveable, or both, and of compelling payment thereof of the moneys due.

Provision in case of representative contributory not paying moneys ordered.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 126 (3) of the English Companies (Consolidation) Act of 1908.

Instead of the words "property moveable or immoveable" the English Act contains the words "personal and real estates." U

N.B.—As to the liability of the personal representatives of a deceased contributory, see S. 126, *supra*, and notes thereunder.

155. Any order made by the Court in pursuance of this Act upon any contributory shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the moneys, if any, thereby appearing to be due or ordered to be paid or due; and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever.

Order conclusive evidence.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 168 of the English Companies (Consolidation) Act of 1908 with this difference, *viz.*, that after the words "in all proceedings" S. 168 of the English Act contains the words "except proceedings against the real estate of a deceased contributory, in which case the order shall be only *prima facie* evidence for the purpose of charging his real estate unless his heirs or devisees were on the list of contributories at the time of the order being made." Y

N.B.—As to the evidentiary value of the list of contributories settled by a voluntary liquidator, see S. 177 (*h*), *infra*.

156. The Court may fix a certain day or certain days on or within which creditors of the Company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved.

Court may exclude creditors not proving within certain time.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 169 of the English Companies (Consolidation) Act of 1908. Y-1

(2) Creditor failing to prove within time, effect of.

(a) Where a creditor of a Company in liquidation fails to bring forward his claim within the time fixed in the notice published under the section, his omission to do so does not preclude him from coming in at a later stage to prove his claim, nor does it necessitate his resorting to a suit to be instituted with special leave of the Court under S. 136, *supra*; the only penalty for failure to come within the time stated in the notice is the penalty prescribed in the latter part of this section, *viz.*, that the claimant is "excluded from the benefit of any distribution made before such debts are proved," that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof. 27 M. 496, following *In re General Rolling Stock Company, Joint Stock Company's claim*, L.R. 7 Ch. 646; see, also, *Kit Hill Tunnee, E. P. Williams*, 16 Ch. 590; *Re McMurdo* (1902), 2 Ch. 684; *Harrison v. Kirk* (1904), A.C. 1; *Hicks v. May*, 13 Ch.D. 236. W

(b) But a creditor cannot prove after all the assets have been distributed. *Ex. P. Forest*, 2 Giff. 42. X

(3) Debts provable in winding-up.

The Act contains no provision corresponding to S. 206 of the English Companies (Consolidation) Act of 1908, as to what debts are provable in the winding-up of a Company. That section provides "in every winding-up (subject in the case of insolvent Companies to the application in accordance with the provisions of this Act of the Law of bankruptcy) all debts payable on a contingency and all claims against the Company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the Company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." Y

N.B.—It is believed that all such debts as are provable under the English Act are also provable in the winding-up of companies under the Indian Act.

(4) Proof of secured debts—English and Indian Law.

(a) Under the English law before the Judicature Act of 1875 came into force, the rule in Chancery as to proof of debts prevailed. Under that rule, a secured creditor could prove for the full amount of his debt and could realize his security afterwards. See *Kellock's case*, 3 Ch. 769; following *Mason v. Bogg*, 2 My. and Cr. 443. Z

(b) But by S. 10 of the Judicature Act (repealed and re-enacted by S. 207 of the Consolidation Act) a secured creditor in a winding up is placed on the same footing as in bankruptcy and can only prove for the balance after realizing or valuing his security. A

General—(Continued).

- (c) Although S. 10 of the Judicature Act (or S. 207 of the English Act) refers only to a Company unable to pay its debts, still, it must be treated as applicable to any Company in liquidation until it is shown that the assets are sufficient for the payment of the debts in full. *Per Lord Selborne, Lord Chancellor, in 25 Ch. Div. 591.* **A-1**
- (d) As regards the Indian law in the three Presidency Courts the rule in Kellock's case that a secured creditor can prove for the full amount of his debt and could realize his security afterwards, "has been followed in practice and has not been questioned." Russell and Bayley, 3rd Ed., p. 460. **B**
- (e) But the Allahabad High Court has held that so far as the Indian Statute Book is concerned, there is no provision made for giving any preference to secured over unsecured creditors, in the winding-up of a Company, and the rule of English Law that secured creditors can only prove for the balance of their debts after deducting the value of their securities should prevail, as being consonant with the rules of justice, equity and good conscience. See 16 A. 53. **C**

N B.—Commenting on this decision Messrs. Russel and Bayley say "this rule has been followed in England since the Judicature Act, S. 10 and if this section holds good, secured creditors will be in the anomalous position of being under the Chancery rule in the three Presidency High Courts, and under the English Bankruptcy rule in the District Courts though both under the same Act. It is suggested, however, that the Judicature Act does not apply to India, and that the rule of justice, equity and good conscience does not enable the Court in interpreting an Indian Act to read an English enactment into it, but that, on the contrary, it entitles creditor to stand on his full contractual rights unless the Act expressly deprives him of them." See Russell and Bayley, 3rd Ed., p. 460.

- (f) But the Punjab Chief Court after referring to this comment, held, that on a proper construction of S. 147, secured creditors can only prove for the balance after deducting the value of their securities. Under the corresponding sections of the English Act of 1862, and the Indian Companies Act of 1866, there were the words "cause the assets of the Company to be collected and applied in the discharge of the liabilities," but in the Act of 1882, after the word 'liabilities' the words 'existing at the date of the said order' (for winding-up) were added. The framers of the Act of 1882, must have been aware of the alteration in English law effected by the Judicature Act, and their object in adding these words must have been to produce in India, the result effected in England by the Judicature Act, S. 10. 55 P.W.R. 1907. **D**

(5) Interest on debt when provable.

- (a) "In the winding-up of an insolvent Company by or subject to the supervision of the Court creditors whose debts carry interest are entitled to dividends only upon what was due for principal and interest *at the date of the winding-up* (i.e., of its commencement); it is only in the event of a surplus that they can claim subsequent interest; in that case the dividends are applicable, first, in the payment of interest and then in reduction of principal." Buckley, 9th Ed., p. 272. **E**

General—(Continued).

- (b) Secured creditors can only prove for the balance after deducting the value of their security as it exists at the date of the order of the winding-up and are not entitled to prove for interest subsequent thereto. 55 P.W.R. 1907. **F**
- (c) Even when the winding-up is voluntary, interest ceases to run from the date of the passing of the winding-up resolution. *Thomas Salt & Co.*, (1908) W.N. 163. See, also, *East of England Banking Co.*, 4 Ch. 14. **G**
- (d) If the Company is, or ultimately turns out to be, solvent, interest is payable upon any debts which carry interest or upon which a right to interest has been acquired, out of surplus assets remaining after payment of principal, and interest up to the date of the winding-up order. Buckley, 9th Ed., p. 474. See, also, *Humber Ironworks, Co., Warrant Finance Co.'s case* (No. 1) 4 Ch. 643; *Duncan & Co.*, (1905) 1 Ch. 307; *Whitaker v. Palmer*, (1904) 1 Ch. 299. **H**
- (6) **Proof by the creditor residing out of the jurisdiction—Security.**
Where a person residing out of the jurisdiction applies for a declaration to prove, he may be required to give security for costs. *Re Pretoria Pietersburg Rail Co.*, (No. 2) 1904, 2 Ch. 359. **I**
- (7) **Proof of debts before appointment of liquidator.**
There is no law which authorizes a Court to pass an order, in winding-up proceedings, admitting the proof of a particular creditor, before any liquidator is appointed. Such an order is irregular. 9 A. 180 (184). **J**
- (8) **Right to set-off.**
- (a) In a suit brought by a company in liquidation the defendant is allowed to set off against the debt due to the Company any ascertained sum due to him from the Company. Such a set-off is allowed also when a creditor is proving for a debt in the winding up. See *Anderson's case*, 3 Eq. 337, followed in 28 M. 240; see, also, *E. P. James*, 8 Eq. 225; *National Wholemeal Bread* (1892), 2 Ch. 457; *Biggerstaff v. Rowatt's Wharf*, (1896), 2 Ch. 93. **K**
- (b) An assignee of a debt due from the Company is entitled to set off that debt against a debt due to him from the Company. See *Mosley Green Coal Co., Barret's case* (No. 2), 4 D. J. & S. 756. **L**
- (c) It is no objection to set off, that one of the debts sought to be set off against one another became ascertained only after the commencement of winding-up. *Progress Assurance Co.*, E.P. 22 L.T. 430. **M**
- (d) But a share-holder who is also a creditor of the Company cannot set off the debt due to him from the Company against a call made up on him in the winding-up. See *Grissell's case*, 1 Ch. 528. **N**
- (e) Under the English law, S. 10 of the Judicature Act, 1875 (replaced by S. 207 of the Consolidation Act) imported into the winding-up of an insolvent Company the rules as to mutual credits and set off in bankruptcy. **N-1**
- (f) The result is that in the case of an insolvent Company, if there have been mutual dealings between the Company and a creditor proving or claiming to prove a debt in the winding-up, an account shall be taken of what is due from the one party to another in respect of such mutual dealings and the sum due from the one party shall be set off

General—(Concluded).

against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid respectively. Compare S. 38, English Bankruptcy Act of 1883. See, also, Presidency Towns Insolvency Act (III of 1909), S. 47, also Provincial Insolvency Act (III of 1907), S. 30. N-2

- (g) Hence, under the English Law in an action by a liquidator for money demanded the defendant is entitled to set off unliquidated damages for breach of contract by the Company. See *Mersey Steel Co. v. Naylor, Benzon & Co.*, 9 Q.B. Div. 648=9 A.C. 434; *Lee and Champion's case*, 26 Ch. D. 624=30 Ch. Div. 216; *Sovereign Life Assurance Co. v. Dodd*, 1 Q.B. D. 405=2 Q.B. 573. O

- (h) Though the Indian Companies Act contains no section corresponding to S. 207 of the English Companies (Consolidation) Act, still as the law of winding-up is closely connected with the law of Insolvency and includes in its scope the protection of the insolvent and the adjustment of the claims of creditors and share-holders and the maintenance of the claims of several creditors, it would seem, that the rule of mutual dealing and set-off applicable to insolvency proceedings, are also applicable to the winding-up of insolvent companies. See 55 P. W.R. 1907. P

157. The Court shall adjust the rights of the contributories amongst themselves¹, and distribute any surplus that may remain amongst the parties entitled thereto².
Court to adjust rights of contributories.

(Notes).**General.****Corresponding English Law.**

This section corresponds to S. 170 of the English Companies (Consolidation) Act of 1908. Q

1.—“The Court.... amongst themselves.”**(1) Adjustment of contributories' rights in voluntary liquidation.**

In the case of a Company in voluntary liquidation, the liquidator shall adjust the rights of contributories and distribute surplus assets. See S. 177, *infra*. R

(2) Rights enforceable under the section.

- (a) The only rights which can be enforced and adjusted under this section are the rights of the contributories as such. *Re Alexandria Palace Company*, (1883), 23 Ch. D. 297, 300; *Addison's case*, 1875 (L.R.) 20 Eq. 620; see, also, *Baird's case*, (1899), 2 Ch. 593. S

- (b) This right includes a right to enforce payment to such an amount as a member is liable under the memorandum. See S. 61, *supra*. T

- (c) Directors who are contributories cannot under this section enforce against others who are also contributories rights which do not belong to them as contributories. *Re Alexandria Palace Co.*, (1883), 23 Ch. D. 297, 300. U

1.—*The Court... amongst themselves*"—(Continued).

- (d) A contract by some contributories to indemnify the rest was held unenforceable in the winding-up. *Addison's case*, 20 Eq. 620. **Y**
- (e) A contract contained in the articles extending the liability of a member beyond his liability under the memorandum in order to provide for the payment of a particular debt has been held to be enforceable. See *Maxwell's case*, 20 Eq. 485; also *McKewan's case*, 6 Ch. D. 447. **W**

N.B.—But these two cases have been doubted. Even if such a contract can be enforced, it may be necessary to bring an action and the person liable under the contract cannot on that account be placed on the list of contributories. See *Baird's case*, 1889, 2 Ch. 593.

(3) **Persons liable to contribute for adjustment.**

Under S. 61, *supra*, not only present members, but also past members are liable to contribute to the assets for purposes (among others) of adjustment of the rights of contributories. **X-Y**

N. B.—Calls made on past members are to be returned to them if the result of the winding-up shows that such calls were unnecessary. *Helbert v. Banner*, L.R. 5 H.L. 28.

(4) **Contributories' rights, how adjusted.**

- (a) The rights of contributories may be adjusted either making larger returns to those who have paid more on their shares or by making calls on those who have paid less. See *Re Hodge's Distillery Co., E.P. Mande* (1870), 6 Ch. App. 51; *Re Anglo Continental Corporation of Western Australia* (1898), 1 Ch. 327 and other cases cited in *Halsbury's Laws of England*, Vol. V, p. 531. **Z**

- (b) Thus, if some share-holders have paid more on their shares than others the Court may equalize the shares by making calls upon those who have paid less on their shares until all the shares become paid in the same proportion. **A**

- (c) Where some shares are fully paid and others are partly paid, a call can be made on holders of partly paid shares for the purpose of adjusting the rights between them and the fully-paid share-holders. *Anglesea Colliery Co.*, 1 Ch. 555=2 Eq. 379, see, also, *National Savings Bank Association*, 1 Ch. 547. **A-1**

N. B.—Shares issued at a discount though credited as fully paid cannot be treated as fully paid. Any provision in the articles of Association which authorizes the issue of shares at a discount is a nullity. The holder of a discount share will be treated merely as the holder of a partly paid share, not only when the creditors are unsatisfied, but also for the purpose of adjustment of the rights of contributories after the creditors have been paid. See *Welton v. Saffery*, 1897, A.C. 299; see, also, *Weymouth Steam Packet Co.*, (1891), 1 Ch. 66.

N. B.—The right of share-holders to have their shares equalized is so clear that even where a resolution for a voluntary winding up is passed on the understanding that no calls should be made except for payment of the debts, a call can be made on holders of partly paid shares for the purpose of equalization. *Provision Merchants' Co.*, 26 L.T. 862.

(5) **Adjustment of contributories' rights, subject to regulations.**

The rule regarding the adjustment of the rights of the contributories is subject to the regulations of the Company; a call for equalizing the shares will not be made, if equality is excluded by the regulations. See

1.—The Court....amongst themselves”—(Concluded).

Doncaster B.S., 4 Eq. 579; *Eclipse Gold Mining Co.*, 17 Eq. 490; *Bangor Slate Co.*, 20 Eq. 59; compare also the words “unless the regulations of the Company otherwise provide” in S. 177 (a), *infra*. **B**

N.B.—But a provision in the articles that a call cannot be made beyond a certain amount without the consent of a certain proportion of shareholders can be enforced only so long as the Company is a going concern and would not preclude the Court from making calls in the winding-up for the purpose of equalizing the shares. *Coed Madog Slate Co.*, (1877), W.N. 190.

(6) Moneys due to members as such to be taken into account in adjustment of their rights.

Though a member cannot prove for any sum due to him in his character of a member, by way of dividends, profits or otherwise, in competition with any other creditor not being a member, still such sum may be taken into account in the final adjustment of the rights of the contributories amongst themselves. See S. 61 (g), *supra*. **C-D**

2.—“Distribute....thereto.”

(1) Contributories, when entitled to share in the assets.

Contributories will not get anything until all the debts, charges and expenses of the winding-up have been paid, all the debts of the Company have been paid, and in some cases until provision is made for satisfying future and contingent claims. See *Halsbury's Laws of England*, Vol. V., p. 530. **E**

(2) Surplus assets, meaning of.

The expression “surplus assets” in the Company's regulations which provide for distribution of surplus assets after return of capital, may mean either what remains after paying the costs, charges and expenses of the winding-up and debts, or what remains after making those payments and returning the paid up capital to shareholders. See *New Transval Co.*, (1896), 2 Ch. 750; *Mutoscope and Biograph Co.*, (1899), 1 Ch. 896; *Peabody Gold Mine* (1897), W.N. 170; *Welsh Whisky Distillery*, 44 Sol. j. 296; *Crichton's Oil Co.*, 1902, 2 Ch. 86; *W.J. Hall and Co.*, (1909), 1 Ch. 521. **F**

(3) Surplus assets, how distributed.

(a) The distribution of the surplus assets among the persons entitled, is to be made according to their rights and interests in the Company. *Griffith v. Paget*, (1877), 5 Ch. D. 894 = 6 Ch. D. 511; *Wall v. London and Northern Assets Corporation*, 1898, 2 Ch. 469; *Re Northern West Argentine Railway* (1900), 2 Ch. 882; cited in *Halsbury's Laws of England*, Vol. V., p. 529. **G**

(b) But, if all the shareholders agree to have a distribution otherwise than in accordance with their legal rights, the agreement will be given effect to. *Beeston Pneumatic Tyre Co.*, (1898) W.N. 34; *North West Argentine Ry. Co.* (1900) W.N. 243. **H**

(c) In the absence of any provision the memorandum or the articles of Association as to the distribution of surplus assets and subject to the terms on which capital has been issued, the surplus assets are distributed

2.—“Distribute....thereto”—(Continued).

and the losses are borne in proportion to the nominal amounts of the shares and not to the sums paid up. See Halsbury's Laws of England Vol. V., p. 530. I

- (d) If some share-holders have paid more on their shares than others, the Court will equalize the shares until all of them become paid up in the same proportion, and the surplus thus arrived at is divided in proportion to the nominal amounts. *E. P. Maude*, 6 Ch. 51; *London India Rubber Co.*, 5 Eq. 519; *Birch v. Cropper*, (1899), 14 App. Case 525; 543; *Driffield Gas Light Co.*, (1898), 1 Ch. 451; *Eclipse Gold Mining Co.*, 17 Eq., 490; *Re Wakefield Rolling Stock Co.*, (1892), 3 Ch. 165; *Oakbank Oil Co. v. Crown*, (1882), 8 App. Cas. 65. J
- (e) Thus, if some only of the shares are fully paid, the fully paid share-holders are, in the absence of special circumstances, as where the articles exclude the right, entitled to receive the difference between the amount paid on their shares and that paid on the other shares. See *Hodges' Distillery Co.*, *E. P. Maude*, 6 Ch. 51; *Scinde, Punjab and Delhi Corporation*, 6 Ch. 53 (n); *London India Rubber Co.*, 5 Eq. 519; *Wakefield Rolling Stock Co.*, (1892), 3 Ch. 165; *Driffield Gas Co.*, (1898), 1 Ch. 451. K
- (f) If the excess paid by the fully paid share-holders represents the amount paid in advance of calls, which carries interest, they are entitled also to interest until payment before the assets are distributed. *Exchange Drapery Co.*, 38 Ch. D. 171, *Wakefield Rolling Stock*, (1892), 3 Ch. 165. L
- (g) If all the shares are fully paid, any surplus assets that may remain after payment of the debts, will, in the absence of special circumstances, be distributed *pro rata*. *Holyford Mining Co.*, Ir. R. 3 Eq. 208; *Brown v. Dale*, 9 Ch. D. 78 and cases *infra*. M
- (h) If a contributory becomes insolvent and the Company proves against his estate, for the estimated liability to future calls, (See S. 125, *supra*) and receives a dividend, the shares do not thereby become fully paid up for the purpose of the distribution of the surplus assets of the Company. *Re West Coast Gold Fields*, (1906), 1 Ch. 1. N
- (i) In such case the other members alone are entitled to share in the distribution of the surplus assets until the amount paid on their shares is reduced to an amount equal to what has been actually paid on the insolvent's shares. (*Ibid.*) O
- (j) Unless the articles otherwise provide, holders of shares issued at a premium are not entitled to have the premium repaid in the winding-up. *Re Driffield Gas Light Co.*, (1898), 1 Ch. 451; see Halsbury's Laws of England, Vol. V., p. 532. P

(4) Preference and ordinary shares.

- (a) The fact that some of the shares are preference shares will not affect the application of the general rules as to distribution of assets, provided the preference is to the payment of the dividends only and not to the payment of capital. See *Driffield Gas Co.*, (1898) 1 Ch. 451. See also *Hodge's Distillery Co.*, *E. P. Maude*, 6 Ch. 51; *In re London India Rubber Co.*, 5 Eq. 519; *Provision Merchants' Co.*, 26 L. T. 862; see also *Holyford Mining Co.*, Ir. 3 Eq. 208; *Doncaster Permanent Building Society*, 4 Eq. 579; *Anglo Continental Corporation*

2.—“Distribute....thereto”—(Concluded).

(1898), 1 Ch. 327; *Somes v. Currie*, 1 K. & J. 605; *Beeston v. Pneumatic Co.*, (1898) W. N. 35=14 Times L. R. 338, which are instances of cases in which the right is excluded by special circumstances. Q

- (b) A contract for a preferential payment of dividend alone does not give a right to preferential payment of capital. See *Bangor Slate Co.*, 20 E. Q. 59; *Eclipse Gold Mining Co.*, 17 Eq., 490; *Driffield Gas Co.*, (1898), 1 Ch. 451; *Griffith v. Paget*, 5 Ch. 894=6 Ch. D. 511. R

(5) Distribution of surplus assets after re-payment of paid-up capital.

- (a) If after adjusting the rights of the members and repaying them their paid-up capital, there is still a surplus, such surplus in so far as it represents capital will, in the absence of any special provision in the articles to the contrary, be distributed among the members in proportion to the nominal amount of their shares, whether preference, or ordinary, not in proportion to the amounts paid on them. *Birch v. Cropper*, 14 A. C. 525; *London and Brighton Stock Exchange Co.*, 4 T.L. R. 2.S

N.B.—The same rule applies to an unlimited Company. See *Driffield Gas Co.*, (1898), 1 Ch. 451.

- (b) If the surplus assets consist of accumulated undistributed profits, they will be divided according to the rights of share-holders in the profits, i.e., after the claims of the preference shareholders have been satisfied, the surplus will go to the ordinary shareholders, if the articles so provide. See *Bridgewater Navigation Co.*, (1891), 2 Ch. 317; *Re W.J. Hall & Co.*, (1909), 1 Ch. 521; *Bishop v. Smyrna Railway*, (1895), 2 Ch. 265.T
- (c) A preference shareholder who has no right to share in the profits unless a dividend has been declared, cannot claim part of the surplus on the ground that a dividend might have been declared out of it. *Odessa Waterworks*, (1901), 2 Ch. 190 n. cited in Buckley, 9th Ed., p. 394. See also *Crichton's Oil Co.*, (1901), 2 Ch. 184=1902, 2 Ch. 86. U

N.B.—Earnings made by the Company since the liquidation form part of the capital, and are not profits. *Bishop v. Smyrna Railway Co.*, (1895), 2 Ch. 596.

(6) Distribution of surplus assets in specie.

- (a) Unless the articles or the memorandum otherwise provide, assets cannot be distributed in specie. But the Court can order such mode of distribution when there is no opposition. *English and Foreign Credit Co.*, 1 T.L.R. 1. Y
- (b) To avoid the risk of loss that may arise by a sale of the assets and distribution of the proceeds, especially where the assets are of a speculative or unsaleable character, it is useful to introduce into the memorandum or articles of association a power to divide surplus assets in specie. See Buckley, 9th Ed., p. 396. W

158. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the Company of the costs, charges and expenses incurred in winding-up any Company in such order of priority as the Court thinks just.¹

Court to order costs.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 171 of the English Companies (Consolidation) Act of 1908. W-1

(2) Costs of voluntary liquidation.

S. 188, *infra*, provides that costs, charges and expenses incurred in the winding-up including the remuneration of liquidation, shall be payable in priority to all other claims. X

I.—“The Court may...just.”

(1) Payment of costs of compulsory liquidation, principles applicable to.

Although this section does not expressly enact as does S. 188 *infra*, that the costs and expenses of winding-up shall be paid in priority to all other claims, the principle of that section (188) applies to all cases. The absence of an express provision for payment of the costs of compulsory winding-up in priority to other claims is due to the fact that it is presumed that no direction is required to the Court to do that which the justice of the case requires, and the Court will see that in the first instance the costs of winding-up would be paid. See *Per Lord Cairns in Webb v. Whiffin*, L.R. 5 H.L. at p. 735. Y

(2) Costs—Order of priority.

In the absence of any special agreement, the costs of winding-up are to be paid out of the assets in the following order. (1) The costs of the petition for winding-up are to be paid first. (2) Next, the costs of realization of assets. (3) Next, the costs ordered to be paid by the liquidator, or out of the assets to a successful litigant in a suit brought or defended by the liquidator. (4) Next, the general costs of the winding-up, and (5) lastly, the remuneration to the liquidator. See Emden's Winding up of Companies, 8th Ed., pp. 276 & 277. Z

(3) Costs of litigation.

(a) The costs payable by the liquidator out of the assets to a successful litigant are *prima facie* to be paid immediately in full in priority to the general costs of liquidation. But, if the liquidator shows that other persons have a prior right to or are entitled *pari passu* with the successful litigant, payment will not be ordered without providing for the other claims. The burden of proving that immediate payment cannot be made is on the liquidator. *London Metallurgical Co.*, 1895, 1 Ch. 759. A

(b) A liquidator ordered to pay the costs with liberty to pay himself out of the estate is entitled to the same priority. *Dominion of Canada Plumbago Co.*, 27 Ch. D. 39. B

(c) When there are several claimants for costs, the date of the order gives no priority; but payment will not be postponed indefinitely till all the claims have come in. *London Metallurgical Co.*, (1895), 1 Ch. 758. C

(4) Liquidator's remuneration.

(a) The liquidator is not entitled to be paid out of the assets for his remuneration, until all the costs of the winding-up including the bill of costs of any solicitor employed by him, and the costs of any provisional

I.—“The Court may....just ”—(Concluded).

liquidator properly appointed, have been paid in full. *Re Massey*, 9 Eq. 367; *Re Trueman's Estate*, 14 Eq. 278; *E.P. Percival*, 6 Eq. 519; *Webb v. Whiffin*, L.R. 5 H.L. 711. **D**

(b) If the liquidator has paid any costs out of his pocket, he is entitled to be repaid *pari passu* with the costs similarly paid by the solicitor. *Re Massey*, 9 Eq. 367. **E**

(c) The liquidator's claim for remuneration cannot interfere with the rights of secured creditors. *Lloyd v. Lloyd (Divid) & Co.*, 6 Ch. D. 339; *Holroyd v. Marshall* (1862), 10 H.L. Cas 191; *Re Oriental Hotels Co.*, (1871) L.R. 12 Eq. 126, 133; *Re Anglo Austrian Printing and Publishing Union*, *Brabourne v. Some*, (1896), 2 Ch. 891. **F**

(5) Order of priority, when property is subject to incumbrance.

(a) Where the liquidator realizes in the winding-up property that is subject to incumbrances, the liquidator's costs, expenses and charges of realization and preservation are to be paid out of the fund first, the principal and interest due to incumbrancers will then be paid in priority to any costs which were not incurred for their benefit. See *Brabourne v. Anglo Austrian Printing Co.*, (1895), 2 Ch. 891. See also *Marine Mansions Co.*, 4 Eq. 601; *Regent's Canal Iron Works Co.*, *E.P. Grissell*, 3 Ch. D. 411; *Perry v. Oriental Hotels Co.*, 12 Eq. 126; *Latham v. Greenwich Ferry*, (1895), W.N. 77. **G**

(b) The liquidator's costs of preserving the property are as between the incumbrancers, and the Company are to be paid by the latter, but the liquidator is entitled to be indemnified out of the fund against any costs of preservation which may not be paid out of the Company's assets. (*Ibid.*) **H**

(c) But, he is not entitled to be indemnified out of the fund against costs not incurred for the benefit of the incumbrancers, such as the costs of carrying on the Company's business. See *Ormerod & Co.*, (1890) W. N. 217. **I**

(d) Where part of the assets were severed from the rest to answer the claims of a creditor, upon which claim there were many incumbrances, and then a petition for payment out of Court was presented and served upon the liquidators, they were held entitled to be paid out of the fund their costs of appearing on the petition, but not their costs, charges and expenses of investigating the claims, or of an abortive attempt at an arrangement. *Bonelli's Electric Telegraph Co*, Cook's claim, 18 Eq. 656. **J**

(6) Costs of solicitors.

(a) The assets will, as a general rule, be rateably distributed amongst the different solicitors, in payment of their costs. Where the liquidator changes his solicitor in the winding-up, and the assets are not sufficient to pay the whole costs, the different solicitors will, as a general rule, be paid rateably so far as the assets will extend. *Audley Hall Cotton Spinning Co.*, 6 Eq. 245. **K**

(b) A liquidator is not personally liable to his solicitor for the costs of the winding-up whether the liquidation is compulsory or voluntary. *Anglo Moravian Co.*, *E.P. Walkin*, 1 Ch. D. 180; *Dominion of Oanada Plumbago Co.*, 27 Ch. D. 83; *Re Trueman's Estate*, 14 Eq. 273. **L**

159. When the affairs of the Company have been completely wound up, the Court shall make an order that the Company be dissolved from the date of such order, (1) and the Company shall be dissolved accordingly.

Dissolution of
Company.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 172 (1) of the English Companies (Consolidation) Act of 1908. M

1.—“When....order.”

(1) “When the affairs....wound-up”, meaning of.

The expression “when the affairs of the Company have been completely wound up” means “so far as the liquidators can wind them up.” *London and Caledonian Marine Insurance Co.*, 11 C.D. 140. N

(2) Company incorporated for public purpose, dissolution of.

A Company incorporated by a special Act of Parliament for a public purpose may be dissolved if it comes under the winding-up jurisdiction of the Court, though the provisions of the Act by which it was incorporated show that it was intended to be maintained in perpetuity. *Bradford Navigation Co.*, 10 Eq. 331, 341 = 5 Ch. 600. O

(3) Existence of contingent claim whether a bar to dissolution order.

Where a claim in respect of a future or contingent debt not provable in the winding-up has been entered, giving the creditor a right of proving for those debts, as and when they became present and certain, what the effect of such claim may be when the time for dissolution arrives, has never been decided; it may be, if at that time the claim is still unascertained and all the assets have been distributed amongst the creditors, the Company will be allowed to be dissolved notwithstanding the existence of such claim. See per *Turner L.J.* in *Haytor Granite Co.*, 1 Ch. 77; per *Lindley L.J.* in *Craig's claim*, 1 Ch. 267. P

(4) Dissolution, consequences of.

(a) Dissolution puts an end to the existence of the Company. *Salton v. New Beeston Cycle Co.*, (1900), 1 Ch. 43. Q

(b) Hence unless the dissolution is avoided, creditors cannot proceed either in the winding-up or by action to recover assets which they could have recovered in the winding-up. *Coxon v. Gorget*. See also *Re Westbourne Grove Drapery Co.*, (1878), 39 L.T. 30. R

(c) Dissolution is a bar to proceedings against the directors, promoters or officers of the Company in respect of any misfeasance or breach of trust. *Coxon v. Gorget*, (1891), 2 Ch. 73. S

(d) Thus, after dissolution, a person, cannot without alleging fraud, sue to make the directors liable for damages for having paid dividends improperly, for, this would, in substance, amount to prayer for a further and more complete winding-up. (*Ibid.*) T

I.—“When....order”—(Continued).

- (e) Dissolution also puts an end to the powers of the liquidators. Where a purchaser of a promissory note from a Company in liquidation did not obtain the liquidator's endorsement until after the Company was dissolved, *held* that the liquidator's power to endorse the note came to an end with the dissolution and that an endorsement made after dissolution was ineffectual. 18 M. 498. **U**
- (f) But, dissolution is no bar to proceedings against the liquidator for breach of the statutory duty of paying the debts and subject thereto, of distributing the assets among the contributories. *Pulsford v. Devenish*, (1903), 2 Ch. 625. **Y**
- (g) A creditor can therefore sue a liquidator for damages if with a knowledge of the creditor's claim, he carries the liquidation to dissolution without seeing that the (creditor) has knowledge of and an opportunity of claiming in the winding-up. (*Ibid.*) **W**

(5) Proceedings against the Company after dissolution.

- (a) A judgment obtained against the Company after dissolution is invalid, and the solicitor acting for the Company is liable to pay the plaintiff's costs from the date of dissolution and consequent on the revocation of his authority. See *Yonge v. Toynbee*, (1910), 1 K.B. 215 C.A., *disapproving Salton v. New Beeston Cycle Co.*, (1900), 1 Ch. 43, *cited in Halsbury's Laws of England*, Vol., V., p. 568. **X**
- (b) But, if proceedings have been instituted before dissolution, an order passed after dissolution is enforceable if the delay is due entirely to the pressure of the business of the Court and is not at all due to the parties. *Whitely Exerciser v. Gamage*, (1898), 2 Ch. 43. See also *Crookhaven Mining Co.*, (1866), L.R. Eq. 69. **Y**

(6) Guarantee for payment of interest, continuance after dissolution.

- (a) A guarantee for payment of interest on a debenture issued by a company 'until repayment of capital' may continue even after the dissolution of the Company. *Re Fitzgeorge*, 1 K.B. 462. **Z**
- (b) But the guarantee will not continue after dissolution if it is "so long as the principle remains due." *Re Moss*, (1905), 2 K.B. 307. **A**

(7) Destruction of Company's books, order for, after winding-up.

After the completion of the winding-up a dissolution order may be obtained so as to bring the Company to an end and to allow the destruction of the books of the Company. Buckley, 9th Ed., p. 400. See also S. 199, *infra*. **B**

(8) Avoidance of dissolution.

- (a) If the dissolution has been obtained by fraud, the Court may, in a proceeding properly instituted, declare the dissolution void, in which case there will be an existing company which may be wound-up compulsorily or in whose voluntary liquidation an application may be entertained. Buckley, 9th Ed., p. 441. **C**

N.B.—The person who seeks to obtain a declaration that the dissolution is void must allege and prove fraud. *Schconer Pond Coal Co.*, (1888), W.N. 70.

- (b) Under the English Law, the Court may, at any time within two years of the dissolution on the application of the liquidator or any other

1.—“ When . . . Order ”—(Concluded).

interested person, declare the dissolution void. Thereupon, such proceedings may be taken as might have been taken if the Company had not been dissolved. See S. 223 (1) of the Companies (Consolidation) Act of 1908. D

(9) Undisposed assets.

- (a) After dissolution, any assets of the Company that may happen to remain, vest in the Crown as *bona vacantia*. See Topham, 2nd Ed., p. 218. See also *Re Higginson*, (1899), 1 Q.B. 325. E
- (b) Thus, where the liquidator of a Company agreed to sell letters patent to A, but the Company was dissolved before the patent was assigned to A, held, the patent was vested in the Crown. *Re Taylor's Agreement Trusts*, (1904), 2 Ch. 737. F
- (c) If a lease to a Company is not assigned before dissolution, the lease is determined and the reversion is accelerated. *Hastings Corporation v. Letton*, (1908), 1 K.B. 378. G

Registrar to make minute of dissolution of Company.

160. Any order so made shall be reported by the official liquidator to the Registrar, who shall make a minute accordingly in his books of the dissolution of such Company.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 172 (2) of the English Companies (Consolidation) Act of 1908. G-1

(2) “Official liquidator” does not include liquidator in winding-up under supervision.

This section and the next contemplate only cases in which there is an official liquidator.

The terms “official liquidator” in this section cannot be construed by the help of S. 195 so as to include the liquidator in a winding-up under supervision. 6 B. 640. H

161. If the official liquidator makes default in reporting to the Registrar, in the case of a Company being wound up by the Court, the order that the Company be dissolved, he shall be liable to a penalty not exceeding one hundred rupees for every day during which he is so in default.

Penalty for not reporting dissolution of Company.

(Note).

General.

Corresponding English Law.

This section corresponds to S. 172 (3) of the English Companies (Consolidation) Act of 1908, under which the penalty is five pounds for every day during which the liquidator is in default. H-1

Extraordinary powers of Court.

162. The Court may, after it has made an order for winding-up the Company, summon before it any officer of the company, or person known or suspected to have in his possession any of the estate or effects of the Company, or supposed to be indebted to the Company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate or effects of the Company. ¹

Power of Court to summon persons before it suspected of having property of Company.

If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, having no lawful impediment (made known to the Court at the time of its sitting and allowed by it), the Court may cause such person to be apprehended and brought before the Court for examination ².

The Court may require any such officer or person to produce any documents in his custody or power relating to the Company. Nevertheless, in cases where any person claims any lien on documents produced by him, such production shall be without prejudice to such lien ³, and the Court shall have jurisdiction in the winding-up to determine all questions relating to such lien.

(Notes).**(General).****(1) Corresponding English Law.**

This section corresponds to S. 174, Sub-ss. (1), (3) & (4) of the English Companies (Consolidation) Act of 1908. H-2

(2) Scope of the section.

(a) A person may be summoned under this section to give evidence concerning the dealings of the Company whether the matters occur in or before the winding-up. *Exp. Carver*, 47 L.J. Ch. 702n. I

(b) To summon a person under this section it is not necessary that there should be a particular dispute pending; it is enough if the liquidator wants to obtain discovery. *Gold Co.*, 12 Ch. D. 77; *Clement's case*, 13 Eq. 179 n; *Norwich Equitable Insur. Co.*, 27 Ch. D. at p. 521. J

(3) Proceedings under the section, nature of.

Proceedings taken under the section are not proceedings to which of necessity there are parties. They may be begun, continued and ended by the Court at its discretion and without any parties before it. 18 A. 215 (218). K

(4) Order, subject to objection on attending.

An order under the section may be made without prejudice to any objection which the witness might take on attending the summons. See *Re Smith, Knight & Co.*, 4 Ch. 421; *Re Contract Corporation*, 6 Ch. 145. L

1.—“The Court may....effects of the Company.”

(1) Witness, how summoned.

A witness under this section must be summoned by a summons and not by a *sub-paena*, for, the Court has to be satisfied that the person summoned is capable of giving the information required. *English Joint Stock Bank*, 3 Eq. 203; *Gold Co.*, 12 Ch. D. 77, 82; *Westmoreland Green Slate Co.* (1892), W.N. 2. M

N.B.—His position is different from that of an ordinary witness. *Clement's case*, 13 Eq. 179 n.

(2) Notice to the person summoned.

The person summoned must have a reasonable notice. *North Wheel Exmouth Mining Co.*, 11 W.R. 58=31 Beav. 628. N

(3) Who may apply for an order.

An application for summons under this section can be made by the liquidator or by a contributory or by a creditor. See *Gold Co.*, 12 Ch. D. 77; *Land Securities Co.*, (1894) W.N. 91. O

N.B.—The Court may also, of its own motion, make an order. *Land Securities Co.*, (1894) W.N. 91.

N.B.—If the winding-up is voluntary the application is to be made under S. 182, *infra*.

(4) Liquidator's application.

An order may be made on an *ex parte* application of the liquidator unsupported by an affidavit. The liquidator need not make out a *prima facie* case, it is enough if there are grounds of suspicion, for, the object may be whether the suspicion is well founded. *Gold Co.*, 12 Ch. D. 77. P

(5) Creditor's or contributory's application.

(a) If a creditor or contributory applies, he must give notice to the liquidator for, generally the Court will give the conduct of the proceedings to the liquidator if he is willing to take the same. But, if the liquidator is not willing, a creditor or contributory may be allowed to proceed. *Gold Co.*, 12 Ch. D. 77; *English Joint Stock Bank*, 3 Eq. 203. Q

(b) A creditor or contributory who applies for an order must make out a *prima facie* case. *E.P. Nicholson*, 14 Ch. D. 243. R

(c) Where a charge is preferred against the liquidator a summons may be obtained by a contributory under this section on establishing a *prima facie* case and before any proceedings are instituted against the liquidator. *Sir John More Gold Mining Co.*, 37 L.T. 242=15 W.R. 900. S

N.B.—The Court may allow a creditor or contributory to conduct the whole or some part of the examination, and even where the liquidator takes the order to examine, and does examine, and there is no suggestion that he is not properly performing his duties a contributory may be allowed to examine too. *Silkstone and Dodworth Co.*, *Whiteworth's case*, 19 Ch. D. 118; cited in *Buckley*, 9th Ed., p. 402.

(6) Discretion of the Court.

(a) The section gives the Court extraordinary powers which at its discretion it may or may not exercise. The applicant whether he is the liquidator or a creditor or a contributory, is not entitled to an order

1.—“The Court may.... effects of the Company ”—(Concluded).

as a matter of right. See 18 A. 215 (218). See, also, *Imp. Cont. Water Corps*, 33 Ch. D. 314; *E. P. Gittins*, (1892), 1 Q.B. 646; *Metropolitan Bank*, *Heiron's case*, 15 Ch. D. 139. T

- (b) Where an order is made the Court may, at the instance of the person summoned, control the examination. *London Paper Mills*, *E.P. Scott*, (1888), W.N. 63; *North Australian Territory Co.*, 45 Ch. D. 87. U

(7) Order when will be refused.

- (a) The powers under the section are inquisitorial and the Court will not allow them to be used for purposes of vexation or oppression. *Imp. Cont. Water Corps*, 33 Ch. D. 314; *E. P. Gittins*, (1892) 1 Q.B. 646. Y

- (b) Thus where a person sued by a Company in liquidation had fully answered interrogatories in the action, and the liquidator made no special case for further examination, an order for his examination was refused. See *Metropolitan Bank*, *Heiron's case*, 15 Ch. D. 139. W

- (c) The Court will likewise refuse to make an order if it thinks that the object of the examination is to gain information not for the more beneficial winding-up of the Company but to assist the applicant in an action brought by him against the Company. *Imp. Con. Water Corps*, 33 Ch. D. 314; *Re Franks*, (1892) 12 B. 647. X

- (d) So also an order will be refused where a dissentient share-holder under S. 204, *infra*, proceeds to arbitration, and seeks an examination with a view to obtaining evidence to enhance the value of his interest. *British Building Stone* (1908), 2 Ch. 450. Y

(8) Order under the section, whether appealable.

- (a) In 18 A. 215 it has been held that an appeal does not lie from an order made under this section.

- (b) As regards English cases, there are some *dicta* in *Gold Co.*, 12 Ch. 77, which go to show that a witness summoned to attend for examination has no *locus standi* to appeal against the order, even where the order has been obtained by a contributory except where there is oppression or abuse of the process of the Court.

N.B.—But these *dicta* have been dissented from in *North Australian Territory Co.*, (1890), 45 Ch. D. 87; see, also, *Whiteworth's case*, (1891), 19 Ch. D. 118.

- (c) It is however clear, according in English cases, in case of oppression or abuse of process, that the order is appealable. (*Ibid.*) See, also, *Gold Co.*; 12 Ch. 77; *Heiron's case*, (1880), 15 Ch. D. 139; *Re London and Lancashire Paper Mills Co.*, (1888), 57 L.J. Ch. 766; *Re Imp. Cont. Water Corps*, (1886), 33 Ch. D. 314. Z

2.—“The Court may cause.... for examination.”

Liability to costs on refusing to attend.

Persons who are summoned under the section and who refuse to attend will be ordered to pay the costs of compelling their attendance. *Trower and Dawson's case*, 14 Eq. 8; *Lisbon Steam Tramways Co.*, 2 Ch. D. 575. A

3.—“In cases....prejudice to such lien.”

(1) Production of documents without prejudice to lien.

The solicitors of the Company may under this section be ordered to produce the books of the Company in their possession notwithstanding that they claim a lien over them. But the production will be without prejudice to the lien though, in many instances, it would render the lien useless. See Buckley, 9th Ed., 467, also, *South Essex Estuary Co.*, *E.P. Payne and Layton*, 4 Ch. 215. **B**

(2) Solicitor's lien on Company's books.

(a) The solicitor to the Company can acquire a valid lien on the documents of the Company which have come into his possession before the winding up, and upon which the directors are competent to give a lien. *Capital Fire Association*, 24 Ch. D. 408; *Rapid Transit Co.*, (1909), 1 Ch. 96. **C**

(b) But he cannot acquire a lien for costs incurred before the incorporation of the Company. *Re Galland*, (1885), W.N. 224. **D**

(c) Directors cannot create a lien upon the register of members, the minute books and other books which under the Act or the Articles of Association are to be kept out at the Company's registered office. *Anglo Maltese Hydraulic Dock Co.*, (1885), W.N. 84=54 L.J. Ch. 1730=52 L.T. 841=33 W.R. 652; *Engel v. South Metropolitan Brewing Co.*, 1 Ch. 442; *Capital Fire Association*, 24 Ch. D. 408; *Rapid Road Transit Co.*, (1908), 1 Ch. 96. **E**

(d) The solicitor cannot acquire a lien on the Company's books which have come into his possession after the commencement of the winding-up. *Capital Fire Association*, 24 Ch. D. 408; *Rapid Road Transit Co.*, (1908), 1 Ch. 96. **F**

(e) Nor on the file of proceedings and documents relating thereto. *Union Cement Co.*, *E.P. Pulbrook*, 4 Ch. 627. **G**

163. The Court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before it in manner aforesaid concerning the affairs, dealings, estate or effects of the Company¹, and may reduce into writing the answers of every such person, and require him to subscribe the same.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 174, Sub-S. (2) of the English Companies (Consolidation) Act of 1908. **H**

1.—“The Court may examine of the Company”

(1) Who may be examined under this section.

- (a) Under this section the Court may examine (1) any officer of the Company,
(2) persons known or suspected to be in possession of any property of

1.—“The Court may examine....of the Company”—(Continued).

the Company or to be indebted to the Company and (3) persons whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the Company.

- (b) Liquidators and directors, or officers who may be examined under the section. *Gold Co.*, 12 Ch. D. at p. 85; *Barned's Baking Co.*, 2 Ch. 350; *Sir John More Mining Co.*, 37 L.T. 242. I
- (c) Persons between whom and the Company there is an action pending may be examined with a view to enable the liquidator to form an opinion as to whether the action should be continued. *Massey v. Allen*, 9 Ch. D. 164; *E.P. Leaver*, 51 L.T. 817; *E.P. Carver*, 47 L.J. Ch. 702 n. J
- (d) So also a person against whom a liquidator intends to institute proceedings. *E.P. Hakin*, 15 L.T. 552. K
- (e) A person who has applied for shares in a false name may be examined. *Pugh and Sharmen's case*, 13 Eq. 566. L
- (f) Any person who is able to give information as to the property of a contributory or the affairs of a person who is sought to be put in the list may be examined. *Financial Insurance Co.*, 36 L.J. Ch. 687. M
- (g) The broker of a contributory may be examined as to the circumstances of a transfer. *Baker's case*, *E.P. Carter*, 19 W.R. 55=40 L.J. Ch. 15=23 L.T. 446. See, also, *Clement's case*, 13 Eq. 179 n. N
- (h) Also the bankers with whom a contributory had an account. *Dritt's case*, 14 Eq. 6; *Smith Knight & Co.*, 4 Ch. 421; *Bloxam's case*, 36 L.J. Ch. 687. O
- (i) A person indebted to a contributory may be examined respecting the means of such contributory. *Trouer and Lawson's case*, 14 Eq. 8. P
- (j) Relatives, such as sister, nephew, and mother-in-law of a contributory may be examined, even though there is no evidence beyond the relationship to show that they can give any information. See *Swan's case*, 10 Eq. 675; *Ficker's case*, 13 Eq., 178. Q
- (k) A shareholder of a Company indebted to the Company in liquidation may be examined. *Contract Corps*, 6 Ch. 145. R

N.B.—A mere creditor cannot be examined. *Accidental and Marine Co.*, 5 Eq. 22.

- (l) But a creditor who is capable of giving information as to an alleged counter claim against him may be examined. *Tyne Chemical Co.*, 43 L.J. Ch. 354. S

(m) An agent claiming commission for service rendered and work done for the Company, or a broker of the Company may be examined. *English Joint Stock Bank*, 3 Eq. 208; *E. P. Carver*, 47 L.J. (Ch) 702 n. T

N.B.—Where there is a dispute between two persons as to which of them is the contributory, an order may be obtained under this section to procure evidence. *Overend, Gurney & Co.*, *E. P. Murgrave*, 16 L.T. 378.

N.B.—A witness examined under the section cannot be asked questions touching the formation of the Company. *Burton Hotel Co.*, v. *Cork* (1899), 1 F. (Ct. of Sess.), 119.

1.—“The Court may examine.... of the Company”—(Continued).

(2) Insufficient grounds for refusal to answer.

- (a) A person examined under this section is not excused from answering questions on the ground that the answer would be hearsay evidence. *Ottoman Co.*, 15 W.R. 1069; *Financial Insurance Co.*, 36 L.J. Ch. 687. U
- (b) Nor can he refuse to answer on the ground that his deposition may be used in evidence against him. *Lisbon Steam Tramways Co.*, 2 Ch. D. 575. Y
- (c) The fact that permission was granted to a person to proceed with an action against a Company in liquidation, would not exempt him from liability to be examined in the winding-up on matters which were in dispute in the action. *E.P. Bateman*, 15 W.R. 118, 245 = 15 L. T. 263, 495 = (1866), W.N. 378, 406. W

N.B.—But if the person has already answered interrogatories in the action, he will not be subjected to a further examination under this section unless the liquidator makes out a strong case. *Metropolitan Bank, Heiron's case*, 15 Ch. D. 139.

(3) Incriminating questions.

- (a) A witness is not excused from answering questions on the ground that the answers will incriminate or tend to incriminate him. See S. 131, Evidence Act (I of 1872). X
- (b) It is otherwise under the English Law. A witness may, under that law, refuse to answer incriminating questions. See, Halsbury's Laws of England, Vol. V, p. 476. Y

(4) Confidential and professional communications.

A witness may refuse to answer questions in relation to matters involving professional confidence. See Ss. 126, 129, Evidence Act (I of 1872). Z

(5) Witness may attend by counsel.

- (a) A witness examined under this section is entitled to attend by his counsel and attorney. *In re Breech-loading Armoury Co.*, *In re Merchants Co.*, 4 Eq. 453; *E.P. Henry Calisher*, 17 L.T. 5 = 15 W.R. 1007. A
- (b) The witness is entitled to be re-examined, and for that purpose the Court, his counsel and attorney may take and carry away notes of his examination. *Cambrian Mining Co.*, 20 Ch. 376. B
- (c) But the Court will not allow them to be used for an improper purpose; they should be destroyed after the examination is over. See *Heseltine & Son*, (1891), W.N. 25. C
- (d) Where the attorney also represents a third party in litigation against the Company, the Court may require an undertaking from him that he will not disclose any information without the leave of the Court. *Haddock's case*, *Hoyle's case*, (1902), 2 Ch. 73 C.A. D

(6) Costs for attendance of counsel or attorney.

A witness examined under this section cannot be given costs of appearing by counsel or attorney. 14 C. 219. E

(7) Penalty for giving false evidence.

If the person examined under the section intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to 7 years and shall also be liable to fine. See S. 217, *infra*.

1.—“The Court may examine....of the Company”—(Concluded).**(8) Use of deposition as evidence.**

(a) Information obtained by a liquidator under this section is obtained only for his guidance as to what is to be done. It cannot be used as evidence as against another party, and can be used as evidence against the person examined, only if he is called as witness and it is put as an admission by him. *North Australian Territory Co. v. Goldsborough, Mort & Co.* (1893), 2 Ch. 381, cited in *Emden's Winding-up of Companies*, 8th Ed., p. 245. **G**

(b) A deposition on oath made by one of several accused as a witness in a previous enquiry under this section is admissible in evidence against himself only, and not against the other accused. See 16 A. 88. **H**

(9) Premature publications of proceedings—Contempt of Court.

Any premature publication of the proceedings under the section amounts to a contempt of Court. *American Exchange in Europe*, 58 L.J. Ch. 706. **I**

(10) Place of examination not an open Court.

(a) The office of the examiner is not a public Court, and the public cannot be admitted if their presence is objected to. *Western of Canada Oil Co.*, 6 Ch. D. 109. **J**

(b) The examination is of a private character, and neither admitted creditors nor creditors who have obtained permission to attend the winding-up generally are entitled to be present, but the Court may, in its discretion, allow them to attend. *Grey's Brewery Co.*, 25 Ch.D. 400; *Heseltine & Son*, (1891) W.N. 25; *Empire Assurance Corporation*, 17 L.T. (N.S.) 488; *Norwich Equitable Co.*, 27 Ch.D. 515. **K**

164. The Court may, at any time before or after it has made

Power to arrest contributory about to abscond or to remove or conceal any of his property.

an order for winding-up a Company, upon proof being given that there is probable cause for believing that any contributory to such Company is about to quit British India or otherwise abscond,

or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the Company, cause such contributory to be arrested, and his books, papers, moneys, securities for moneys, goods and chattels to be seized¹, and him and them to be safely kept until such time as the Court may order.

(Notes).**General.****Corresponding English Law.**

This section corresponds to S. 176 of the English Companies (Consolidation) Act of 1908.

1.—“Cause....seized.”**(1) Exercise of powers under the section in the alternative.**

The powers conferred by the section may be exercised in the alternative; and the Court, while ordering the seizure of the goods of an absconding contributory, may decline to order his arrest. See *Imperial Mercantile Credit Co.*, 5 Eq. 264. **L**

General—(Concluded).

(2) Seizure of immovable property of absconding contributory not allowed.

This section authorizes the seizure of only the moveable property of the contributory. There is no section by which his immovable property is affected. See Buckley, 9th Ed., p. 411. **M**

165. Any powers by this Act conferred on the Court shall be deemed to be in addition to, and not in restriction of, any other powers subsisting of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the Company, for the recovery of any call or other sums due from such contributory or debtor, or his estate; and such proceedings may be instituted accordingly.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 177 of the English Companies (Consolidation) Act of 1908. **N**

The English Act refers not only to proceedings against the estate of a contributory but also to proceedings against the estate of a debtor. But the Indian Act does not apply to proceedings against the estate of a debtor.

(2) Liquidator's power to sue for calls.

The powers of the Court under this Act being cumulative, the liquidator of a Company in voluntary liquidation can enforce the payment of calls by instituting a suit instead of proceeding by an application under S. 182. See 9 Bom. L.R. 825. **O**

(3) Suit for call—Jurisdiction of Subordinate Court.

A suit for call is not a proceeding under S. 182, and may be instituted in the Court of Subordinate Judge though it is not a Court as defined by S. 130, *supra*. (*Ibid.*) **P**

Enforcement of, and Appeal from, Orders.

166. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending there-in may be enforced.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 178 (1) of the English Companies (Consolidation) Act of 1908 which applies to the enforcement of orders made by the High Court in England or Ireland. **Q**

For enforcement of orders for calls on contributories made in Scotland, see S. 179 of the Consolidation Act.

General—(Concluded).**(2) Order in compulsory winding-up enforceable by execution.**

An order for a call in a compulsory winding-up may, by virtue of this section, be enforced by execution. But in a voluntary liquidation, the liquidator can enforce calls only by an application to Court under S. 182, or by an action in the name of the Company. See *Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175. R

167. Any order made by a Court for or in the course of the winding-up of a Company under this Act shall be enforced in any part of British India, other than that in which such Court is situate, in the Court that would have had jurisdiction in respect of such Company if the registered office of the Company had been situate in such other part¹, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

Order made in any Court to be enforced by other Courts.

(Notes).**General.****Corresponding English Law.**

This section corresponds to S. 180, Sub-Ss. (1) and (2) of the English Companies (Consolidation) Act of 1908, which provide for an order made in one of the three United Kingdoms (England, Scotland and Ireland) being enforced in the other two Kingdoms.

1.—“Shall be enforced....other part.”**(1) Order restraining proceedings out of the Court's jurisdiction.**

After a winding-up order, the Court may make an order restraining actions and proceedings pending against the Company in any Court situated in a part of British India other than that in which the Court making the order is situated; for, the Act applies to the whole of British India, and by virtue of this section the order can be enforced by the Court in which the proceedings are pending as if it was made by itself. Cf. *International Pulp Co.*, 3 Ch.D. 594; *Middlesborough Fire-brick Co.*, (1885), W.N. 7=52 L.T. 98; *Hermann Loog & Co.*, *Ramsay's case*, 36 Ch.D. 502. S

(2) Notices and orders on persons out of jurisdiction.

The Court cannot give leave to serve notices of orders and proceedings in the winding-up on persons who are out of the jurisdiction. *Anglo-African Co.*, 32 Ch.D. 348. T

N.B.—But this applies only to orders and proceedings which, it is desired, to enforce. A notice of the time and place appointed for the settlement of the list of contributories may be served out of the jurisdiction. *Nathan Newman & Co.*, 35 Ch.D. 1; *Liebig's Cocoa Works* (1888), W.N. 120, cited in Buckley, 9th Ed., p. 413.

N.B.—“A person resident out of the jurisdiction, who comes and proves in the winding-up is thereby probably brought within the authority of the Court, but if the order is made against him it may not be enforceable.” See Buckley, 9th Ed., p. 413; see, also, *E.P. Robertson*, 20 Eq. 733.

1.—"Shall be enforced....other part"—(Concluded).

(3) Security from petitioner residing out of jurisdiction.

A petitioner who resides out of the jurisdiction, though in British India may notwithstanding this section be called upon to give security for costs. Cf. *Howe Machine Co., Fountain's case*, 41 Ch.D. 118. U

(4) Execution pending appeal, creditor residing out of jurisdiction.

Having regard to this section the Court will not stay an execution pending an appeal merely because the party entitled to the fruits of the judgment is residing in a part of British India out of the jurisdiction of the Court. Cf. *E.P. Union Bank of Australia*, 1891, W.N. 132, cited in *Buckley*, 9th Ed., p. 413. Y

168. Where any order or decree made by one Court is required

Mode of dealing
with orders to be en-
forced by other
Courts.

to be enforced by another Court as hereinbefore provided, a certified copy of the order or decree so made shall be produced to the proper officer of the Court required to enforce the same, and the pro-

duction of such certified copy shall be sufficient evidence of such order or decree having been made; and thereupon such last-mentioned Court shall take such steps in the matter as may be requisite for enforcing such order or decree, in the same manner as if it were the order or decree of the Court enforcing the same.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 180 (3) of the English Companies (Consolidation) Act of 1908. That section contains the words "*order interlocutor or decree*" instead of the words "*order or decree*" in the present section.

169. Re-hearings of, and appeals from, any order or decision

made or given in the matter of the winding-up of a Company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction¹; subject to this restriction, that no such re-hearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure² unless such time is extended by the Court of appeal³.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 181 of the English Companies (Consolidation) Act of 1908: the provision dealing with the limitation of time for appeals

General—(Concluded).

is contained in the rules in the Supreme Court. Sub-sections (2) to (4) to S. 181 deal with orders or judgments pronounced in Scotland. Sub-section (2) (i) provides that in the case of certain orders and judgments pronounced by the Lords Ordinary on the Bills in vacation, and specified in the first part of the fourth schedule to that Act, there shall be no review, reduction, suspension or stay of execution. Sub-S. (2) (ii) and sub-S. (3), allow review in other cases only by a reclaiming note in common form presented within fourteen days from the date of the order or judgment.

Sub-S. 4 provides that nothing in the section shall affect the provisions of the Act in reference to decrees in Scotland for payment of calls in the winding-up of Companies, whether voluntary or subject to the supervision of the Court.

Under the English law whether the appeal is from the winding-up order itself or a decision or order in the winding-up, the time for appealing is, except by special leave of the Court of Appeal, fourteen days calculated from the time at which the order is signed, entered or otherwise perfected or in the case of a refusal of an application from the date of refusal. R.S.C. Ord. 58, rr. 9 & 15; *National Funds Assurance Co.*, (1876), 4 Ch. D. 305; *Re National Stores, Ltd.*, 1899, 2 Ch. 773. W

(2) Scope of the section.

An appeal is given under this section from any order or decision made by the Court in the matter of the winding up of a Company, whether the winding up be compulsory, voluntary or under supervision. An order refusing to make a supervision order under S. 191 is therefore appealable. 90 M. 23—16 M.L.J. 537. X

(3) Appeals under Acts XIX of 1857 and X of 1866.

Act XIX of 1857 contained no provision as to appeal and it was held that an order made in the winding up of a Company under the Act was not appealable. But orders made in the winding-up of Companies under Act X of 1866 were applicable under S. 141 of that Act. See 6 B.H. C. A.C.J. p. 185. Y

1.—“*Re-hearings.... Ordinary jurisdiction.*”

(1) Review of orders in winding-up.

(a) The re-hearing referred to in the section is a re-hearing by way of appeal and not a re-hearing by the Court of appeal of its own orders, and the limit of twenty-one days fixed by the section does not apply to the re-hearing of the latter kind. *Brett's case*, 29 L.T. 255=8 Ch. 800. Z

(b) The section is not intended to refer to a case in which a judge upon the discovery of fresh matter, considers it expedient to pass a fresh order, or to review an order passed by him. 16 A. 53 (57). See, also, *In re the National Assurance and Investment Association, ex Parte Munday*, 31 Beav. 206. A

(c) A judge may review an order passed by him in the winding-up in the circumstances set forth in S. 114 and O. 47, r. 1 of the C.P.C. (Act V of 1908). There is nothing in the Indian Companies Act to forbid such procedure. See 16 A. 53 (57), following in *Re the National Assurance and Investment Association, ex parte Munday*, 31 Beav. 206. B

1.—“*Re-hearings....Ordinary jurisdiction*”—(Continued).

(d) A re-hearing may be granted when important documents are discovered after the case has been argued. *Wiltshire Iron Co., E.P. Pearson*, 3 Ch. 443. **C**

(e) Where a person who was placed on the list of contributories obtained on appeal a reversal of the order, and another person against whom a similar order was made, applied for leave to appeal after the time limited for appeal had expired, *held*, leave was unnecessary for all orders similar to that reversed on appeal would be reversed in chambers. *E.P. Munday*, 31 Beav. 206. **D**

(f) Some indulgence in respect of re-hearing would be allowed in winding-up cases inasmuch as the issues are not so distinctly brought out in them as in cases brought before the court by means of regular pleadings and the time limited for appeal is short. *Wiltshire Iron Co., E.P. Pearson*, 3 Ch. 443; see, also, *Burkinshaw v. Nicolls*, 3 A.C. 1004; *Craig v. Philips*, 7 Ch. D. 249. **E**

(2) Section not applicable to *ex parte* order.

The section was not intended to apply to an application to set aside an *ex parte* order, which is not, strictly speaking an application for a re-hearing, although it may result in it. 19 B. 208. **F**

(3) Orders made without jurisdiction, whether within the section.

(a) In *Plumstead Water Co.*, 2 D.F. & J. 20, it was held that the time limited for appeals did not apply to cases where the appeal was presented on the ground that the order appealed against was made without jurisdiction.

N.B.—But Buckley says “It may be that the order of the Court below must be taken as determining that it had jurisdiction and is therefore to be treated as an erroneous order open to appeal in the usual way.” Buckley, 9th Ed., p. 417.

(b) An order obtained at the instance of an alleged contributory whose name has since been removed from the list of contributories is a nullity, and the power of the Court to discharge such order is not affected by the expiration of the period limited by the section. *Estates Investment Co., E.P. Turnley and Oliver*, Eq. 227. **G**

(4) Application to Court against liquidator's decision in winding—under supervision.

The provisions of this section as to the time limit for appeal would also, it seems, apply, by way of analogy, to applications to the Court against the decision of the liquidator in a winding-up under supervision. Thus, a person who disputes his liability to be placed on the list of contributories with the liquidators should apply to the Court within three weeks to alter the decision of the liquidators. See *E.P. Trory's Executor*, 17 L.T. 198. **H**

(5) Application to Court to discharge made in chambers.

In *National Stores, Limited* (1899), 2 Ch. 773, 776, it was held that on the analogy of S. 181 of the English Act corresponding to the present section a three weeks' notice would be required where an application is made in Court to discharge an order made in chambers. **H-1**

(6) Appeal against order of single Judge of High Court.

An order of a single Judge of the High Court refusing an application to extend the period for giving notice of appeal under the Act is not a judgment within the meaning of S. 10 of the Letters Patent and no appeal lies from such order, 17 A. 498. **I**

1—"Re-hearings....Ordinary jurisdiction"—(Concluded).

(7) Application for rectification in winding-up—Appeal.

An application for rectification of the register of members in the winding up of a Company, is to be made under S. 147, not under S. 58, *supra*, and an order made on such application is subject to the limitation imposed by this section for purpose of appeal. See 27 A. 509. J

(8) Appeal by creditors and contributories.

(a) A creditor or a contributory who has appeared during the hearing of the petition may appeal against a winding-up order, though he was not himself the petitioner. But a creditor or contributory who has not appeared in the Court below cannot appeal without leave obtained for the purpose. *Securities Insurance Co.*, (1894) 2 Ch. 410. K

(b) A creditor can appeal without leave against an order refusing to include a person in the list of contributories. *Etna Insurance Co., E.P. National Provincial Bank of England*, R. 7 Eq. 362. L

(c) A contributory who has been settled on the list may apply to have other persons similarly settled on the list. *Bush's case*, 6 Ch. 246; *Murray v. Bush*, L.R. 6 H. L. 37. M

(d) A contributory may, by leave, appeal against an order excluding another contributory from the list. *Ship's case*, 2 D.J. & S. 544; *Downes v. Ship*, L.R. 3 H.L. 343. N

(9) Leave to appeal.

(a) In cases where leave to appeal is considered necessary, it must be obtained from the Judge of first instance, and then, if the time for appeal has expired, an extension must be obtained from the Court of Appeal. *Etna Insurance Co., E. P. National Provincial Bank of England*, 21 W.R. 718. O

(b) If the liquidator desires to appeal against an order made in the winding-up, he should, in order to be safe as to costs, apply for leave. *City and County Investment Trust*, 13 Ch. D. 475, 483. See, also, *Silver Valley Mines*, 21 Ch. D. 381. P

(c) If he appeals without leave and the appeal fails, he will not generally be allowed costs. (*Ibid.*) Q

(d) Where the liquidator appeals, it would seem, that a contributory cannot also appeal without leave, for, the Court will not, in general, hear both contributories and the liquidator in the winding-up. See *Ship's case*, 2 D. J. & S. 544. R

(e) But, in other cases, it would seem that a creditor or contributory can appeal without leave. See *Etna Insurance Co., E. P. National Provincial Bank of England*, L.R. 7 Eq. 362. S

(10) Order binding unless appealed against.

A winding-up order made by a Court of competent jurisdiction, though improper, must, until reversed on appeal be treated as valid in all subsequent proceedings. *Arthur Awrugo Association*, 3 Ch. D. 522; *Padstow Total Loss Association*, 20 Ch. D. 137. See, also, *Welsh Potosi Co., E., P. Clarke*, 2 De. G. & J. 245; *E.P. Carter*, 1 D. M. & G. 212; *Carter v. Dimmock*, 4 H.L.C. 337. T

(11) Order does not bind strangers.

But the order is not a judgment *in rem* and does not bind strangers. *Bowling v. Welby's Contract*, (1895) 1 Ch. 663. U

2.—“No such re-hearing....Code of Civil Procedure.”

(1) Period of limitation, for appeals under the section.

(a) An appeal against an order in the matter of the winding-up of a Company by the Court, must under this section be filed within three weeks of the date of the order at the latest. Per *Davies, J.*, in 25 M. 576. See, also, 18 A. W.N. 215; 4 C. 704=3 C.L.R. 581; 19 M.L.J. 511=4 Ind. Cas. 872; 30 C. 578. **Y**

(b) It is not sufficient that the appeal from an order or decision made in the winding up of a Company, is filed within three weeks; but the law also requires that notice in the manner provided by the Civ. Pro. Code should be given to the respondent within three weeks. 22 M. 291; see, also, 30 C. 758; 95 P.R. (1908). **W**

(c) In the case of an appeal under this section, the 90 days provided by the Indian Limitation Act, Article 156, is reduced to a period that will allow of service of notice on the respondent, under an order of admission of the appeal by a judge of the Court, within three weeks. Per *Chatterji, J.* in 95 P.R. 1908. **X**

(d) But see the observations of *Bhashyam Aiyangar, J.* in 25 M. 576. **Y**

(2) Period how calculated.

In computing the period of three weeks within which notice of appeal is to be given, the provisions of the Limitation Act, S. 12, are inapplicable, and the appellant is not entitled to exclude from the period of three weeks the time that was requisite for obtaining a copy of the order appealed against. See 95 P.R. 1908; 18 A. 215 (219); 19 M.L.J. 511=4 Ind. Cas. 872. **Z**

(3) What constitutes notice of appeal.

(a) The notice of appeal referred to in this section is a notice to the other party of the fact that an appeal has been filed. See 25 M. 516. See, also, 95 P.R. (1908). **A**

(b) It need not be notice of hearing of appeal; it is merely a notice that an appeal has been filed. Per *Johnstone, J.*, in 95 P.R. (1908). But see the judgment of *Chatterji, J.*, in the same case. **B**

(c) The appellant should add to his memorandum a separate petition asking, in view of this section, that a special notice be at once issued to the respondent intimating that an appeal has been filed. Notice of the date of hearing of appeal cannot issue until the appeal has been before a judge in chambers and has been admitted, a process that usually takes some weeks. (*Ibid.*) **C**

(d) A mere notice of an intention to appeal is not a sufficient notice of appeal. *New, Callao*, 22 Ch. D. 484. **D**

N.B.—In 25 M. 576, *Bhashyam Aiyangar, J.*, however, refrained from expressing an opinion as to whether the notice of appeal referred to in the section is notice of an intended appeal or notice to the other party of an appeal, which has been already filed.

(4) Notice of appeal how served.

(a) The service of the notice of appeal has to be effected by the Court, and not by the appellant himself. See 4 C. 704=3 C.L.R. 581; see, also, 95 P.R. 1908. **E**

(b) A notice out of Court is clearly insufficient to fulfil the requirements of the section. 95 P.R. 1908. **F**

2.—“No such re-hearing....Code of Civil Procedure”—(Concluded).

(c) But in 25 M. 576, *Bhashyam Aiyangar, J.*, while refraining from expressing an opinion on the point, stated that the provision of this section may probably be satisfied by the lodging of the memorandum of appeal and not the service of the notice of hearing of the appeal on the respondent. F-1

(5) Appellant's duty to certain service notice.

Although the notice has to be served through the Court, and not by the appellant himself, it is nevertheless the duty of the appellant to ascertain whether the notice had been duly given and, if he finds that it had not, to apply to extend the time. 4 C. 704=3 C.L.R. 581. G

(6) Application for extension after expiration of the period.

An application for extending the period within which an appeal may be brought may be made even after the expiration of the period limited by the section, and the Court may grant the extension and allow the appeal to be presented. *Banner v. Johnston, L.R. 5 H.L. 157; Manchester Economic Society, 24 Ch. D. 488.* H

3.—“Unless....Court of Appeal.”

(1) *Ex parte* order extending time.

Where an application is made under the section for the extension of time during which notice of appeal should be given, notice of such application need not be given to the opposite party, and an order granting an extension may be made *ex parte*. But when such *ex parte* order is made the opposite party is entitled to raise objection to the extension at the hearing. 25 M. 576. I

N.B.—But, in some English cases it has been held that after the time for appeal has expired, leave will not be given on an *ex parte* application. See *Lama Italian Co., (1867), W.N. 119; Hull Forge Co. 15 W.R. 474; National Funds Assurance, 4 Ch. D. 305; Re Laurence, 4 Ch. D. 189.* But see *E.P. Besleyed, 3 Mac. & G. 287.*

(2) Extension of time, when will be granted.

(a) The object of the Act being the speedy disposal of matters, an extension of time, will not be granted in the absence of special circumstances. *In Re Baston, 87 L.J. (Ch.) 51; Madras Irrigation Co., 23 Ch. D. 248; Esdaile v. Payne, 40 Ch. D. 520, 533, 534.* J

(b) The Court will extend the time only on good cause shown. 19 M.L.J. 511 = 4 Ind. Cas. 872. K

(c) An extension will not be granted simply because the applicant has an equity properly so called; he must show something which entitles him to ask for the indulgence of the Court to relieve him from the legal bar that is imposed by the Act. *International Financiers Society v. Moscow Gas Co., 7 Ch. D. 241, 247, etc.* L

(d) An extension will be granted where the delay has been caused not by appellant's laches but by conduct of the respondent or by “accident”, such as mistakes in the office above. *Per Johnstone, J. in 95 P.R. 1908; Cf., New Callao case, L.R. 22 C.D. 484.* M

(e) Where a subsequent decision of the Court of Appeal shows the order to be erroneous on a point of law, but the error is not discovered before the time of appeal has expired an extension may be granted, *Ebbu Vale., 5 Ch. 112, Esdaile v. Payne, 40 Ch.D. 520.* N

I.—“Unless.....Court of appeal”—(Concluded).

- (f) But even in such a case special circumstances must be shown. *Esdaile v. Payne*, 40 Ch.D. 520, 533, 534. N-1
- (g) In the absence of special circumstances, a person who was obtained a judgment shall not be deprived of the benefits thereof, after the judgment had become absolute without any appeal being preferred against it within time. (*Ibid.*) O
- (h) The time will not be extended by reason of a different decision of a Court of co-ordinate jurisdiction. *Hull Forge Co.*, 15 W.R. 474=36 L.J. (Ch.) 387. P
- (i) An extension may be granted where it is thought necessary to secure justice, e.g., where three out of six persons who were jointly and severally liable (being the three who as between the six were *prima facie* primarily liable) appealed on the last day without the knowledge of their fellows. *Clayton Mills Co.*, 31 Ch. D. 28; Cited in Buckley, 9th Ed., p. 415. Q
- (j) Or where the intending appellants have from the first expressed an intention to appeal, but from a slip, and by reason of a *bona fide* mistake, have allowed the time to expire. *International Life Assurance Society*, L.C. & L.J.J., 17th Dec. 1874; *Taylor's case*, 8 Ch. D. 643. R
- (k) Or where a notice of appeal as given is wrong in point of form. *Munns v. Burn*, 34 Ch. D. 664. S
- (l) A winding-up order was made on a petition served on the abandoned office of an unregistered Company, the petition was unopposed, and did not state the fact, that the number of members exceeded twenty; subsequently after the time for appeal had expired a member heard for the first time of the order and applied within a week to appeal against the order, leave was granted. *Padstow Association*, 20 Ch. D. 187; cited in Buckley, 9th Ed., p. 416. T
- (m) Where an appellant did not give notice of appeal to the respondent until the last day allowed for the purpose, the respondent was allowed to present a cross-appeal though the time limited for appeal had expired. *E.P. Kiveton Coal Co., In re Philips*, 7 Ch. 780. U
- (n) The appellant's ignorance of the practice or the comparative novelty of the special procedure prescribed by the section is not a sufficient ground for extension. 95 P.R. (1908). V
- (o) In the absence of special circumstances, mere mistake of the appellant is not a sufficient ground. *Coles Ravenshear* (1907), 1 K.B. 1; *Re Helsby*; (1894), 1 Q.B. 742; *McAndrew v. Barker*, 7 Ch. D. 701; *New Callao*, 22 Ch. D. 484; see *Manchester Economic Society*, 24 Ch. D. 488, in which the circumstances were quite exceptional. Y-1
- (p) In the case of the *Manchester Economic Society*, (L.R. 24 Ch. D. 488) an extension was granted because first, the action of the respondent company raised an equity in favour of the appellant, and secondly, the interests of others other than the actual appellants were involved. Y-2

(3) Execution pending appeal.

The Court of appeal will not stay execution where there is default in complying with an order for giving security for costs. *Re Corporation of British Investors*, 1897, W.N. 36 C.A. W

(4) Effect of discharge of winding-up order on subsequent proceedings.

All proceedings in the winding-up, such as proof of debts, orders for calls, &c., will be discharged if the winding-up petition is dismissed on appeal. *E.P. Williamson*, 5 Ch. 309, 314. X

170. In all proceedings under this Part of this Act, every Court, Judge and person judicially acting, and all other officers, judicial or ministerial, of any Court, or employed in enforcing the process of any Court, shall take judicial notice of the signature of any officer of any other Court, and also of the official seal of any other Court, when such seal is appended to any document made, issued or signed under the provisions of this Part of this Act, or any official copy thereof.

Judicial notice to be taken of signature of officers.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 225 of the English Companies (Consolidation) Act of 1908. Instead of the words 'of any other Court' in this section, S. 225 of the English Act contains the words 'of the High Court in England or Ireland, Court of Session, or Court exercising the stanneries jurisdiction.'

X-1

171. The Judges of the District Courts, who sit at places more than twenty English miles from the usual place of sitting of the High Court, shall be Commissioners for the purpose of taking evidence under this Act in cases where any Company is wound up in a High Court; and it shall be lawful for the High Court to refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed Commissioner, although such Commissioner is out of the jurisdiction of the Court that made the order or decree for winding-up the Company.

Special Commissioners for receiving evidence.

Every such Commissioner shall, in addition to any power of summoning and examining witnesses and requiring the production or delivery of documents and certifying or punishing defaults by witnesses, which he might lawfully exercise as a Judge of a District Court, have, in the matter so referred to him, all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses as the Court which made the order for winding-up the Company has; and the examination so taken shall be returned or reported to such last-mentioned Court in such manner as it directs.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 226 of the English Companies (Consolidation) Act of 1908 which provides, among other things, that Judges of the County Courts who sit at places more than twenty miles from the General Post Office, and the Judge exercising the bankruptcy jurisdiction in Ireland, and the Assistant Barristers and Recorders in Ireland and the Sheriffs of counties in Scotland shall be commissioners for the purpose of taking evidence under that Act when a company is wound-up in any part of the United Kingdom. S. 227 of the English Act provides for the examination of persons in Scotland by commission directed to sheriffs. Z

172. If any affidavit, affirmation or declaration, required to be sworn or made under the provisions or for the purposes of this Part of this Act, be lawfully sworn or made in British India, or in Great Britain or Ireland, or in any colony, island, plantation or place under the dominion of Her Majesty in foreign parts, before any Court, Judge or person lawfully authorized to take and receive affidavits, affirmations, or declarations, or before any of Her Majesty's Consuls or Vice-Consuls in any foreign parts out of Her Majesty's dominions, all Courts, Judges, Justices, Commissioners and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature¹ (as the case may be) of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit, affirmation or declaration, or to any other document to be used for the purposes of this Part of this Act.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 228 of the English Companies (Consolidation) Act of 1908. A

1.—“All Courts.... seal and stamp or signature.”

Facts judicially noticeable need not be proved.

No fact of which the Court shall take judicial notice need be proved. S. 56, Indian Evidence Act (I of 1872).

N.B.—As to the facts of which the Courts in British India shall take judicial notice, see S. 57, Evidence Act. B

Voluntary Winding-up of Company.

Circumstances under which Company may be wound up voluntarily.

173. A Company under this Act may be wound up voluntarily,

(a) whenever the period, if any, fixed for the duration of the Company by the articles of association expires, or

whenever the event, if any, occurs upon the occurrence of which it is provided by the articles of association that the Company is to be dissolved, and the Company in general meeting has passed a resolution requiring the Company to be wound up voluntarily¹ ;

- (b) whenever the Company has passed a special resolution requiring the Company to be wound up voluntarily² ;
- (c) whenever the Company has passed an extra-ordinary resolution to the effect that it has been proved to its satisfaction that the Company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same³ :

For the purposes of this Act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore defined.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 182 and S. 69 (1) of the English Companies (Consolidation) Act of 1908. G

(2) Object of voluntary winding-up.

The object of a voluntary winding-up is to leave the Company and its creditors to settle their affairs without coming to the Court, and to provide them with every facility for applying to the Court if necessary. See *Rance's* case, 6 Ch. 104, 115. D

(3) What Companies may be wound up voluntarily.

The following Companies may be wound up voluntarily under this Act, namely, (1) Companies formed and registered under this Act including Companies registered under Part VII *infra*, although the registration has taken place with a view to winding up, (2) Companies registered under the Indian Companies Act of 1866, (3) Companies formed and Registered under the Joint Stock Companies Act (XIX of 1857 and VII of 1860) or either of them, and (4) Companies registered but not formed under the said Acts or either of them. See Ss. 222, 223, 240, *infra*. E

N.B.—An unregistered Company under part VIII, *infra*, cannot be wound up voluntarily or even subject to supervision. See S. 243, Sub-S. 2, *infra*.

N.B.—Companies registered under the Joint Stock Companies Acts may be wound up voluntarily or subject to supervision without being re-registered under this Act. Such Companies are not unregistered Companies within S. 243, *infra*. See *London and India Rubber Co.*, 1 Ch. 329 ; *Torquay Bath Co.*, 32 Beav. 581 ; *Beaujolais Wine Co.*, 3 Ch. 15.

General—(Concluded).

(4) Right of winding up cannot be excluded by Company's regulations.

The right of shareholders to wind up a Company voluntarily cannot be excluded by any provision in the articles. Any rule made by a Company, which purports to preclude the winding up of a Company for reasons for which and under circumstances in which the Act provides that a Company may be wound up is *ultra vires*. 29 C. 688 (692) following *Trevor v. Whitworth*, (1887), L.R. 12 A.C. 409. F

(5) Injunction to restrain winding up.

"An injunction to restrain the shareholders from exercising their statutory right of winding up the Company, is, it is submitted, except under very exceptional circumstances out of the question." Buckley, 9th Ed., p. 420. G

(6) How far can creditors control voluntary winding up.

(a) Creditors have no voice as to whether a Company shall be wound up voluntarily. But a Company about to be or in the course of being wound up voluntarily may, by an extraordinary resolution, delegate to its creditors or to any committee of them the power of appointing liquidators or any of them and of supplying vacancies among the creditors, or enter into any arrangement with respect to the powers to be exercised by the liquidators and the manner in which they are to be exercised.

Any act done by the creditors in pursuance of such delegated authority shall have the same effect as if it had been done by the Company. See S. 179, *infra*. H

(b) Moreover, a Company about to be or in the course of being wound up voluntarily, may enter into an arrangement with its creditors and such arrangement shall, subject to any right of appeal under S. 181, *infra*, be binding on the Company if sanctioned by an extraordinary resolution and on the creditors if acceded to by three-fourths in number and value of the creditors. See S. 180, *infra*. I

N.B.—But a creditor of a Company in voluntary liquidation has no right to apply to the Court to determine questions arising in the winding up but under the English Law they have such right. See S. 182, *infra*, and notes thereto.

N.B.—If a creditor thinks that his rights are prejudiced by the voluntary winding up he may apply for a compulsory order under S. 189, *infra*, or for a supervision order under S. 191, *infra*.

I.—"Whenever the period....to be wound up voluntarily."

Winding up by ordinary resolution.

A Company can be wound up by an ordinary resolution only in cases mentioned in cl. (a) *i.e.*, where the period if any, fixed by the articles for its duration, has expired, or the event occurs upon the occurrence of which, it is, by the terms of its articles, to be dissolved. See *Topham*, 2nd Ed., 221; see, also, *Halsbury's Laws of England*, Vol. V., p. 570. J

2.—“A special resolution....voluntarily.”

(1) Winding up of solvent Companies.

A Company may be wound up by a special resolution even though it is flourishing; under a proviso in a lease for forfeiture upon liquidation the landlord would be entitled to enter upon liquidation though the Company is solvent and the winding up is with a view to re-construction. *Horsely Estate, Ltd. v. Steiger*, (1899), 2 Q.B. 79; see, also, *Fryer v. Ewart*, (1902), A.C. 187. K

N.B.—For the definition of special resolution, see S. 77, *supra*.

(2) Winding up invalid unless resolution is duly passed.

(a) Resolutions for voluntary winding up are not valid unless the meetings have been duly convened in accordance with the provisions of the Act, and the regulations of the Company as to the summoning and as to the conduct of the meetings have been complied with. *E.P. Mott and Turner*, 81 L.T. 738. L

(b) When the provisions of S. 77 as to “special resolution” have not been complied with, there can be no voluntary winding up of a Company under cl. (b). 29 C. 688 (698). M

(c) The notice of the meeting should not be conditional. Thus, where a special resolution is to be passed a notice convening the first meeting, and stating further that should the resolution be passed in it, it should be submitted for confirmation on a day named, is not a valid notice so far as the second meeting is concerned. *Alexander v. Simpson*, 43 Ch. D. 189. N

(3) Resolution for winding up coupled with invalid resolutions—Validity of.

(a) A winding up resolution which is otherwise valid would not be rendered invalid by the fact that it is associated with the other resolutions that are invalid or not regularly passed. *Irrigation Company of France, E.P. Fox*, 6 Ch. 176; *Thomson v. Henderson Estates*, (1908), 1 Ch. 765; *Cleve v. Financial Corporation*, 16 Eq. 363; *E.P. Fox*, 6 Ch. 176; *Clinch v. Financial Corporation*, 4 Ch. 117. O

(b) Thus, a resolution for winding up is not invalidated by the fact of its being passed contemporaneously with a resolution for amalgamation which has turned out to be *ultra vires*. *Cleve v. Financial Corporation*, 16 Eq. 363. P

(c) Where, however, notice is given of resolutions for voluntary winding up, the appointment of a liquidator, and the approval of a re-construction and the resolution for winding up alone is passed, the resolution may be void as resulting in something different from that of which notice was given. *Re Teede and Bishop Ltd.*, (1901), W.N. 52=70 L.J. Ch. 409; *C.F. Gutta Percha Corp.*, (1900), 2 Ch. 665, 670. Q

(4) Copy of special resolution to be forwarded to Registrar.

Where a Company is wound up by a special resolution, a copy of the resolution shall be printed and forwarded within fifteen days to the Registrar of Joint Stock Companies and be recorded by him. See S. 79, *supra*. R

(5) Advertisement of resolution.

The Company must give notice of any special or extraordinary resolution for winding up by advertisement in the local official Gazette and also in some newspaper (if any) circulating in the place where the registered office of the Company is situate. See S. 176, *infra*. S

3.—“Has passed an extraordinary resolution... same.”

(1) Extraordinary resolution—Definition of.

A resolution is an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or proxy (when proxies are allowed by the regulations) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. Cf. S. 77, *supra*. T

(2) Notice of extraordinary resolution.

(a) Where an extraordinary resolution is to be passed the notice of the meeting should clearly refer to the intention to pass a *final* resolution and state that it is intended to propose a resolution to the effect mentioned in clause (c), *viz.*, that the Company cannot, by reason of its liabilities, continue its business and it is intended to wind up the same. Otherwise the resolution would be invalid. *Bridport Old Brewery Co.*, 2 Ch. 191; *Stone v. City and County Bank*, 3 C.P.D. 382; *Silkstone Fall Colliery Co.*, 1 Ch. D. 38; *National Savings Bank*, 1 Ch. 547. U

(b) Thus, an extraordinary resolution was held bad where the notice of the meeting simply declared that it was intended “to consider the present position of the Company’s affairs and the desirability of bringing its operations to a close and to pass a resolution for the voluntary winding up of the Company, if it should be determined to do so.” *Re Silkstone Fall Colliery Co.*, (1875), 1 Ch.D. 38. Y

N.B.—But a notice which gives a reasonable intimation of what is proposed to be done should not be strictly construed. *Wright’s case*, 12 Eq. 335 n, 345 n.

(c) A notice in terms of clause (c) is enough if the notice follows the exact words of the sub-section every share-holder will be taken to know that the resolution will require no confirmation. *Stone v. City and County Bank*, 3 C.P.D. 282, 296. W

174. A voluntary winding-up shall be deemed to commence

Commencement of
voluntary winding
up.

at the time of the passing of the resolution authorising such winding-up. When the winding-up is in pursuance of special resolution, it shall be deemed to commence at the time of the passing,

under section 77, of the confirmatory resolution ¹.

(Notes).

General.

(1) Corresponding English Law.

The first sentence of this section corresponds to S. 183 of the English Companies (Unconsolidation) Act of 1908. There is no express provision in the English Act corresponding to the second sentence of this section. But this sentence merely follows the decisions in the following English cases, namely, *Dawe’s case*, 6 Eq. 232; *Weston’s case*, 4 Ch. 20; see, also, *Hornby’s case*, 16 W.R. 1164=19 L.T. 237. X

N.B.—As to the date of the commencement of winding up when the voluntary winding up is superseded by a compulsory order or is continued under the supervision of the Court, see notes to S. 183, *supra*.

General—(Concluded).**(2) Adoption of proceedings in voluntary winding-up when compulsory order made.**

(a) Where a voluntary winding up is superseded by a compulsory order, the Court may adopt all or any of the proceedings taken in the course of the voluntary winding up. See S. 190, *infra*. Y

(b) Even if the Court does not expressly adopt the proceedings in the voluntary windings, the compulsory order has not the effect of rendering those proceedings absolutely invalid. *Thomas v. Patent Lionite Co.*, 17. Ch. Div. 250. Z

1.—“When the winding up... Confirmatory resolution.”**Winding up by special resolution—Proceedings against Company.**

(a) As a winding up by a special resolution commences on the date of passing the confirmatory resolution, a creditor who levies execution between the preliminary and confirmatory resolutions, is in the position of a secured creditor and will not, in the absence of special circumstances, be prevented from realizing his debt. See *Maclaren*, 16 Ch. D. 534; see, also, notes to S. 184, *supra*. A

(b) Similarly, the rule that if a distress has been levied before the commencement of winding-up, further proceedings under the distress will not, in the absence of special circumstances, be restrained, is not affected by the fact that the distress has been levied between the preliminary and confirmatory resolutions. See *Roundwood Colliery Co.*, (1897), 1 Ch. 378. B

(c) Nor will the proceedings be restrained by the fact that a provisional liquidator has been appointed before the distress was levied. *Dry Docks Corporation*, 39 Ch.D. 806. C

N.B.—Where a Company is wound-up voluntarily in pursuance of a special resolution, the winding-up commences only on the date of the confirmatory resolution even though a provisional liquidator has been previously appointed. *Re Emperor Life Assurance Society*, 81 Ch.D. 78; *West Cumberland Iron Co.*, 40 Ch. D. 361, *not following Ex. P. Bradshaw*, 15 C.D. 465.

175. Whenever a Company is wound up voluntarily the Com-

Effect of voluntary winding-up on status of Company. company shall, from the date of the commencement of such winding-up, cease to carry on its business except in so far as may be required for the beneficial winding-up thereof ¹; and all transfers of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the Company, taking place after the commencement of such winding-up, shall be void ²; but its corporate state and all its corporate powers shall, notwithstanding that its regulations otherwise provide, continue until the affairs of the Company are wound up ³.

(Notes).**General.****Corresponding English Law.**

This section corresponds to S. 184 and S. 205, sub-sec. (1) of the English Companies (Consolidation) Act of 1908. D

1.—“The Company shall....beneficial winding up thereof.”

(1) Amalgamation after commencement of winding up.

From the date of the commencement of the winding up the Company ceases to exist except for the purpose of winding up. It cannot therefore after that date amalgamate with another Company under the provisions in the articles. *London and Bombay and Mediterranean Bank, Ltd., Drews' case*, 36 L.J. (Ch.) 785=16 L.T. 657; see, also, *Payne v. The Cork Co.*, (1900), 1 Ch. 308. E

(2) Contract not required for beneficial winding up—Legality of.

(a) If the liquidator enters into a contract that is not for the beneficial winding up of the Company, the contract is not illegal as between the Company and the persons with whom it is entered into, though it may not be binding as between the shareholders and the liquidator. The section is confined to the relations between the Company and its officers. *Bateman v. Ball*, (1887), 20 Q.B.D. 387, 389. F

(b) But even if such contract is illegal the onus of proving the illegality lies on the person who urges the illegality. *Hire Purchase Furnishing Co. v. Richens*, (1887), 20 Q.B.D. 387, 389 C.A. G

N.B.—As to the meaning of the expression “business necessary for the beneficial winding up of the Company,” and the limits within which the liquidator can carry on business during the winding up, see notes to S. 177, *infra*.

2.—“All transfers of shares....shall be void.”

(1) Transfers of shares after winding up commenced, when valid.

This section renders the liquidator's sanction necessary for all transfers of shares made after the commencement of the winding up, except for transfers made to the liquidator's. H

N.B.—Having regard to the provisions of this section it is doubtful whether a shareholder can, under any circumstances, repudiate a transfer after the resolution for winding up has been passed. *Stone City and County Bank, E. P. Budden*, 12 Ch. D. 288, cited in Buckley, 9th Ed., p. 453.

(2) Winding up by special resolution, transfer between preliminary and confirmatory meetings.

Where a Company is wound up by a special resolution, as the winding up commences only on the passing of the confirmatory resolution, a transfer of shares made and registered between the preliminary and confirmatory resolutions is valid and is not void for want of the liquidator's sanction. *Hornby's case*, 16 W.R. 1164=19 L.T. 237. I

(3) Successive transfers of shares—Liability of transferors and transferees.

Where, with the sanction of the liquidator, shares are successively transferred, the last transferee alone is liable as a present member, the prior transferees are liable only as past members. *Taylor v. Phillips and Richard's case*, (1897), 1 Ch. D. 298. J

(4) Conditional sanction.

(a) The liquidator's sanction to a transfer may be absolute or conditional. See *Taylor, Phillips and Richard's case*, (1897), 1 Ch. 298; see, also, *Cleve v. Financial Corporation*, 16 Eq. 363, 375, 381. K

2.—“All transfers of shares....shall be void”—(Concluded).

(b) Thus, a transfer may be sanctioned on the condition that transferor shall guarantee that the transferee shall continue to pay calls. *Cleve v. Financial Corporation*, (1873), L.R. 16 Eq. 363. L

(5) Liquidator's power to rectify the register.

A power to sanction transfers involves a power to rectify the register of members. *Cleve v. Financial Corporation*, 16 Eq. 363. M

(6) Transfer of shares without liquidator's sanction, legality of.

Though a transfer of shares after the commencement of winding up made with the liquidator's sanction is void, it is not illegal. An action lies against a person who has become bound to execute a transfer, for refusing to do so though the sanction of the liquidator has not been obtained, and that whether it was the duty of the purchaser or the vendor to procure the sanction. *Biederman*, L.R. 2 C.P. 504. N

(7) Cancellation of forfeiture made before winding up.

The section does not authorize the liquidator to cancel a valid forfeiture of shares made by the directors before the winding up. *Dawe's case*, 6 Eq. 232. O

(8) Transfer of debentures without liquidator's sanction.

The section renders necessary the liquidator's sanction only for the transfer of shares. Debentures may be transferred without sanction. *Goy & Co., Ltd., Farmer v. Goy & Co., Ltd.*, (1900), 2 Ch. 149. P

(9) Transfer by liquidator—Company a necessary party.

The winding up of a Company has not the effect of vesting its property in the liquidator and therefore the Company must be a party to all conveyances; the Company conveys by the direction of the liquidator. See *Emden's Winding up of Companies*, 8th Ed., p. 295. Q

3.—“Its corporate state....wound up.”

Corporate power of Company includes Director's powers sanctioned under S. 177.

The corporate powers of the Company include the powers which the Directors may continue to exercise under a proper sanction under S. 177 (e), *infra*. *Ladd's case*, (1893), 3 Ch. 450; See *Buckley*, 9th Ed., p. 422. R

176. Notice of any special resolution or extraordinary resolution passed for winding-up a Company voluntarily shall be given by advertisement in the local official Gazette, and also in some newspaper (if any) circulating in the place where the registered office of the Company is situate.

Notice of resolution to wind-up voluntarily.

(Notes).
General.

Corresponding English Law.

This section corresponds to S. 185 of the English Companies (Consolidation) Act of 1908. The words “local official” before the word “Gazette” and the words “and also in some newspaper.....is situate” are not found in the English Act. S

Consequence of
voluntary winding-
up.

177. The following consequences shall ensue upon the voluntary winding-up of a Company :—

- (a) the assets of the Company shall be applied in satisfaction of its liabilities *pari passu* as they exist at the commencement of the winding-up ¹, and subject thereto, shall, unless the regulations of the Company otherwise provide, be distributed amongst the members according to their rights and interests in the Company ² ;
- (b) liquidators shall be appointed for the purpose of winding-up the affairs of the Company and distributing the assets :
- (c) the Company in general meeting shall appoint such persons as it thinks fit to be liquidators ³ and may fix the remuneration to be paid to them ⁴ :
- (d) if one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him :
- (e) upon the appointment of liquidators, all the powers of the directors shall cease, except in so far as the Company in general meeting or the liquidators, may sanction the continuance of such powers ⁵ ;
- (f) when several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two ⁶ :
- (g) the liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidators ⁷ :
- (h) the liquidators may exercise the powers hereinbefore given to the Court of settling the list of contributories of the Company, and any list so settled shall be *prima facie* evidence of the liability of the persons named therein to be contributories ⁸ :
- (i) the liquidators may, at any time after the passing of the resolution for winding-up the Company, and before they have ascertained the sufficiency of the assets of the Company, call on all or any of the contributories for the

time being settled on the list of contributories, to the extent of their liability⁹, to pay all or any sums they deem necessary to satisfy the debts and liabilities of the Company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves; and the liquidators may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made partly or wholly fail to pay their respective portions of the same :

- (j) the liquidators shall pay the debts of the Company, and adjust the rights of the contributories amongst themselves.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 186, sub-secs. (1) to (vii) of the Companies (Consolidation) Act of 1908. T

1.—“The assets....at the commencement of the winding-up.”

- (1) Company wound up subject to supervision—Provisions applicable to distribution of assets.

Where a Company is being wound up subject to the supervision of the Court, the provisions applicable to the distribution of assets are those contained in S. 147, *infra*, and not the present section. 55 P.W.R. 1907. U

- (2) Right of creditors to payment *pari passu*.

(a) This section recognises the liability of the liquidators to pay the debt of the Company and limits the rights of creditors to a payment *pari passu* upon the voluntary winding up of the Company. 15 M. 97. V

(b) As the main object of the winding-up is the collection and distribution of the assets among the general body of creditors *pari passu*, in sections which deal with the administration of assets, Courts will not view with favour any construction which would lead to any mode of distribution other than *pari passu*. See *Black & Co's case*, 8 Ch. 254, 263. See, also, *In re Great Ship Co., Parry's case*, 4 D.J. & S. 63 = 33 L.J. Ch. 245. W

- (3) *Pari passu* distribution, when excluded.

(a) The rule of *pari passu* distribution does not apply to liabilities which do not exist at the commencement of winding-up. Thus, where some creditors had before winding-up received a dividend but the others did not, and there was no question of fraudulent preference, those who did not receive the dividend were not on that account allowed in the winding-up any priority over those who had received it. *Smith, Knight & Co., E.P. Ashbury*, 5 Eq. 223. X

1.—“*The assets....at the commencement of the winding-up*”—(Contd.).

- (b) The rule does not apply to costs and expenses incurred on behalf of the estate in the winding-up. Such costs and expenses are to be paid in full. They are not debts existing at the commencement of the winding-up. See *E.P. Levick*, 5 Eq. 69; see, also *International Marine Co.*, 28 Ch. D. 470; *Blazer Fire Lighter Co.*, (1895), 1 Ch. 402. **Y**
- (c) Thus costs, given against a Company in liquidation in an action brought by or against it are payable in full and are not merely provable. *Madrid Bank v. Pelly*, 7 Eq. 442; *E.P. Levick*, 5 Eq. 69; *E.P. Smith*, 3 Ch. 125. **Z**
- (d) Where an action commenced by a Company before winding-up was continued by the liquidators with the leave of the Court after the Company had gone into voluntary liquidation, the successful defendant was held entitled to payment in full of all his costs including costs incurred before winding-up. *London Drapery Stores*, (1898), 3 Ch. 684. **A**
- (e) Similarly, “debts and liabilities incurred by the liquidator or by the Company after the winding-up in the course of carrying on the business of the Company must be paid in full. Such debts and liabilities are not debts and liabilities of the Company in liquidation. They are debts and liabilities incurred subsequently to the liquidation.” *Per Fry*, *L.J. International Marine Co.*, 28 Ch. D. 473. **B**

N.B.—As to what constitute assets when the Company's property is subject to incumbrances, and as to the order of payment among the different classes of creditors, see notes to S. 158, *supra*.

N.B.—S. 186, cl. (i) of the English Act corresponding to cl. (a) of this section contains the word “property” instead of the word “assets” but that word has been held to mean the same thing as ‘assets’ and includes not only property but also unpaid capital recoverable from the present or past members. See *Morris’ Case*, 7 Ch. 200 (204)=8 Ch. 800; *Webb v. Whiffin*, L.R. 5 H.L. 711, 724, 735.

(4) **Priority of Crown debts.**

- (a) The provision in this section relating to *pari passu* distribution of the assets does not affect the rights of the Crown to priority of payment of the Crown debts. See *Henley & Co.*, 9 Ch. D. 469. **C**
- (b) The Crown is not, either expressly or by implication, bound by the Act. *B.H.C.O.C.* 23. **D**

(5) **Suit against liquidators for neglect to distribute assets among creditors.**

- (a) In the absence of fraud or *mala fides* a contributory cannot, while the liquidation continues, sue the liquidator for breach of his duty to pay the debts of the Company *pari passu*. His only remedy is to apply to the Court under S. 182 for relief in respect of his rights. See *Knowles v. Scott*, (1891), 1 Ch. 717. **E**
- (b) But after the dissolution of the Company, the statutory remedy given by S. 182 is gone, but the duty of the liquidator in respect of the distribution of the assets still remains and an action for damages will lie against him (liquidator) for breach of that duty. *Pulseford v. Devenish*, (1903) 2 Ch. 625. **F**

1.—“*The assets....at the commencement of the winding-up*”—(Concl.).

(6) Voluntary liquidation no bar to suit against Company.

(a) A Company which has gone into voluntary liquidation is not absolved, under this section from liability to be sued for debts incurred prior to the liquidation. The fact that there are liquidators may be material, if execution is sought of the decree. 15 M. 97. See, also, 1 Ind. Jur. N. S. 380. G

(b) The right to sue to recover a debt is in the nature of a common law right, and unless it is taken away either expressly or by necessary implication, it must be treated as subsisting. (*Ibid.*) H

2.—“*Subject thereto....in the Company.*”

Distribution of assets among members according to regulations of the Company.

One of the articles of association of a Company provided that a member who had received no loan might withdraw from the association and receive the amount at his credit in calls *minus* the arrears (if any) and interest due thereon on giving one month's notice, such withdrawals to be paid from first available funds. *Held* that the members who had given notice to withdraw and whose notices had expired before the commencement of winding-up were entitled to be paid out of the assets in priority to the other investing members who had not given notice of withdrawal, notwithstanding that, at the date of the winding-up, there were no funds in hand for their payment. 19 M. 85. I

N.B.—As to the distribution of surplus assets among creditors, see further notes to S. 157, *supra*.

3.—“*The Company in general meeting....to be liquidators.*”

(1) Appointment of liquidators.

(a) Cl. (c) provides that the Company shall appoint liquidators in general meeting. But instead of so doing the Company may, by an extraordinary resolution, delegate to its creditors, or to a Committee of its creditors the power of appointing liquidators. An appointment made by the creditors in pursuance of such delegated power has the same effect as an appointment made by the Company. See S. 179, *infra*. J

(b) Where the winding-up is by an extraordinary resolution, liquidators may be appointed at the one meeting held. See Emden's Winding-up of Companies, 8th Ed., p. 296. K

(c) Where the winding-up is by a special resolution, an appointment made at the first meeting and confirmed at the second is good. *London and Australian Agency Co.*, 22 W.R. 45=29 L.T. 417=(1873) W.N. 198. See *Petersburg Gas Co.*, 24 W.R. 230=33 L.T. 637. L

(d) But the appointment made at the first meeting is not effectual if it is not subsequently confirmed, and if the resolution appointing the liquidator passed at the first meeting is rejected at the second meeting, the appointment is not validated by the fact that the principal resolution, *i.e.*, to wind up, has been confirmed. *Indian Zoedone Co.*, 26 Ch. D. 70. M

(e) Nor is it possible to fall back upon the resolution passed at the first meeting and treat it as binding. (*Ibid.*) N

3,—“*The Company in general meeting....to be liquidators*”—(Continued).

(f) If no resolution had been passed for the appointment of liquidators at the first meeting, an appointment made at the second meeting after the special resolution has been confirmed, or at any subsequent meeting, is good. A special resolution is not necessary for their appointment. See Topham, 2nd Ed., p. 223; Emden's Winding-up of Companies, 8th Ed., p. 296. O

(g) It is usual to give notice of the resolution for appointing the liquidators and to give the names of the persons proposed; an appointment made after the resolution for winding-up has been passed, is good though no notice of the intended appointment has been given. *Trench Tubeless Tyre Co.*, (1900) 1 Ch. 408; *Oakes v. Turquand*, L.R. 2 H.L. 325. P

(h) Notices were sent out to confirm a resolution to wind-up and to appoint W as liquidator. At the meeting the resolution to appoint was dropped and another person M was appointed. The appointment was held good, as no notice was needed. *Re Trench Tubeless Tyre Co.*, (1900) 1 Ch. 408. Q

(2) **Liquidator not to be appointed before passing of winding-up resolution.**

The Company cannot appoint a liquidator unless and until an effective resolution has been passed to wind it up. *Halsbury's Laws of England*, Vol. V., p. 572. R

(3) **Notice of liquidator's appointment—English Law.**

Under the English law the liquidator in a voluntary winding-up shall, within twenty-one days of his appointment, file with the Registrar a notice of his appointment in the form prescribed by the Board of Trade. Non-compliance with this provision renders the liquidator liable to a penalty of £5 a day. See S. 187 of the English Companies (Consolidation) Act of 1908. S

4) **Liquidator to convene meeting of creditors—English Law.**

(a) He is also required within seven days of his appointment to send notice by post to all persons who appear to him to be creditors of the Company that a meeting of the creditors is to be held on a date not less than fourteen days nor more than twenty-one days after his appointment, and advertise notice of the meeting in the *Gazette* and in at least two local newspapers circulating in the District where the registered office or principal place of business of the Company was situate. S. 188 (1). (*Ibid.*) T

(b) At the meeting thus convened, the creditors shall determine whether an application shall be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the Company or for the appointment of a Committee of inspection, and if the creditors so resolve an application may be made accordingly to the Court at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting. On any such application the Court may make an order either for the removal of the liquidator appointed by the Company, and for the appointment of some other person as liquidator or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the Company or

3.—“*The Company in general meeting....to be liquidators*”—(Concluded)

for the appointment of a Committee of inspection either together with or without any such appointment of a liquidator or pass such other order, as having regard to the interests of the creditors and contributors of the Company, may seem just. S. 188 (2) & (3), (*Ibid.*) U

N.B.—These provisions which were first introduced by the Companies Act of 1907, and the provision of S. 192 of the Consolidation Act, which enables creditors of a Company in voluntary liquidation to apply to the Court to determine questions arising in the winding-up, have, by giving the creditors a substantial control over winding-up proceedings, considerably reduced the occasions for supervision orders. See notes to S. 191, *infra*.

N.B.—There are no corresponding provisions in the Indian Act.

(5) **Liquidators how far subject to Company's control.**

Liquidators appointed under the section are not, in the discharge of their duties, subject to the control of the Company, except in so far as the sanction of an extraordinary resolution of the Company is required in the case of arrangements with the creditors or debtors of the Company, made by liquidators under the supervision of the Court in a voluntary winding-up under Ss. 201, 202. 30 M. 22 (24). Y

(6) **Liquidator not to act as a creditor's wakil.**

Where a person who was the wakil of a principal creditor whose debt was in dispute in the liquidation was appointed as liquidator to the Company, *held*, that such a person ought not, after such appointment, to continue to act as a wakil of the creditor. 9 A. 180. W

(7) **Defect in appointment of liquidators how far affects their acts.**

Acts done by liquidators before any defect in their appointment has been discovered is valid. But proceedings taken by them, after their appointment has been clearly shown to be invalid, are abortive. See *Bridport Old Brewery Co.*, 2 Ch. 190. X

(8) **Removal of liquidators.**

Liquidators appointed under this section by a Company, cannot be removed by the Company, but only by the Court under S. 185 on due cause shown. 30 M. 22 (24). Y

4.—“*May fix....to them.*”

(1) **Remuneration of liquidators, when fixed.**

The remuneration of liquidators may be fixed by the Company in general meeting. It may be fixed at the meeting in which the liquidators are appointed or at any subsequent meeting. See *Emden's Winding up of Companies*, 8th Ed., p. 297. Z

(2) **Remuneration how determined.**

In assessing the remuneration that is to be paid to voluntary liquidators, the Court is not bound to adopt the scale fixed for official liquidators. Each case must be considered with reference to its own special circumstances. *Re Amalgamated Syndicate Ltd.*, (1901), 2 Ch. 181. A

4.—“*May fix . . . to them*”—(Concluded).

(3) Invalidity and winding-up, how affects liquidator's remuneration.

(a) A liquidator cannot claim remuneration, as such, if the resolution for winding-up has been set aside as invalid and the Company is afterwards ordered to be wound up. *Birkenshaw*, (1904), 2 K.B. 327. B

(b) But, he can claim reasonable remuneration for any work done by him or which has been useful to the Company for business purposes unconnected with voluntary liquidation or which has been used by the official liquidators with full knowledge of the facts. *Re Allison, Johnson and Foster, Ltd.*, E.P. *Birkenshaw* (1904), 2 K.B. 327, cited *Halsbury's Laws of England*, Vol. V, p. 575. C

(4) Liquidator's remuneration postponed to solicitor's costs.

The costs of the solicitors to a voluntary liquidator are payable in priority to the liquidator's remuneration. *Re Trueman's Estate, Hooke v. Piper*, (1877), L.R. 14 Eq. 278. D

N.B.—But the liquidator is not personally liable to the solicitor for costs. *Re Massey, Re Freehold Land Brickmaking Co.*, (1870), L.R. 9 Eq. 367.

5.—“*Upon the appointment . . . such powers.*”

(1) Directors whether officers of the Company after liquidation.

Notwithstanding this sub-section, it seems the directors do not in a voluntary, any more than in a compulsory, winding-up cease to be officers of the Company. See *Buckley* p. 425; See also, *Madrid Bank v. Bayley*, L.R. 2 Q.B. 37; *Shaws Bryant & Co.*, (1901) W.N. 125. E

(2) Directors' powers, when cease.

(a) The passing of a voluntary resolution does not of itself deprive the directors of their powers; it is only on the appointment of a liquidator that their powers cease except in so far as the Company in general meeting or the liquidator sanctions their continuance. F

(b) In a compulsory winding-up, the winding order puts an end to the power of directors at any rate, as to making calls. *Fowler v. Broad's Patent Night Light Co.*, (1893), 1 Ch. 724. G

(3) Continuance of director's powers, when may be sanctioned.

A sanction for the continuance of the powers of the directors may be given at the time of appointing the liquidators or at any subsequent time. A Company can, even several years after the commencement of the voluntary winding-up, elect directors and sanction their exercising powers such as selling or forfeiting shares for non-payment of calls. *Ladd's case*, (1893), 3 Ch. 450. H

N.B.—Where there are no directors they may be elected for the purpose. *Ladd's case*, (1893), 3 Ch. 450.

6.—“*When several liquidators . . . two.*”

Powers of liquidators, delegation of.

(a) Liquidators cannot delegate their powers to one of their own body or to any one else. *London and Mediterranean Bank, Exp. Birmingham Banking Co.*, 3 Ch. 651; *Bolognesi's case*, 5 Ch. 567; *London and Mediterranean Bank, E.P. London and South Western Bank*, 36 L.J. (Ch) 807; *E.P. Agra and Masterman's Bank*, 6 Ch. 206; see, also, 16 M.L.J. 537 = 30 M. 22. I

6.—“When several liquidators....two” —(Concluded).

- (b) They cannot, for instance, delegate to arbitrators or to any one else their statutory duties of paying the debts of the Company and of adjusting the rights of the contributories among themselves. 30 M. 22. J
- (c) After winding up, a director who was also one of the four liquidators accepted a bill of exchange. *Held*, the Company was not bound to pay. *Bolognesi's case* (1870), L.R. 5 Ch. App. 567. K
- (d) But the liquidators can, perhaps, authorize one of their members to do ministerial acts on which they have previously exercised their discretion. Buckley, 9th Ed., p. 425. L
- (e) But, even with regard to a purely ministerial act, if one of two liquidators dies before the act is done, the survivor alone cannot do it. Thus, where after an agreement was entered into by two liquidators, one of them died before the Company's seal was annexed to a deed embodying the terms of the agreement, *held*, the surviving liquidator had no power to affix the seal. *Re Metropolitan Bank and Jans*, 2 Ch. D. 366. M
- (f) Where in the liquidation of an unregistered Company several liquidators were appointed and an order vesting the Company's property in six of the liquidators was made and it was declared that two out of the six might do all acts, etc., required, *held* that all the six must concur to pass the legal estate in the property. A conveyance executed by two of them operated to pass only two-sixths of the legal estate. *Ebsworth and Tidy's Contract*, 42 Ch.D. 28. N

7.—“The liquidators may, without the sanction....official liquidators.”

(1) Power to sell Company's property.

Among the powers referred to in this clause is included the power of selling the Company's property. But the liquidator may, if he thinks fit, apply to the Court under S. 182, *infra* and get its approval for the contract of sale. See *Scinde, etc., Bank Corporation*, 15 L.T. 602 = 1867, W.N. 41; see, also, *Alexandra Hall Co.*, 16 L.T. 7. O

(2) Power to borrow money on security of Company's assets.

A liquidator of a Company that is being voluntarily wound-up has power to borrow any requisite sums of money upon the security of the assets of the Company. The borrowing in such a case need not be on mortgage or pledge or charge of specific property but may be on the security of the assets generally. 18 C. 31 (36). P

(3) Power to rectify the register.

It seems that a voluntary liquidator can rectify the register of members without applying to the Court. *Brighton Arcade Co. v. Dowling*, L.R. 8 C.P. 125. Q

N.B.—But notwithstanding this case Buckley doubts whether he can rectify the register without the Court's sanction. See Buckley, 9th Ed., p. 425.

N.B.—It is doubtful whether in a winding-up under supervision the liquidators have power to rectify the register of members without the sanction of the Court. *Gilbert's case*, 5 Ch. 559.

7.—“*The liquidators may, without the sanction....official liquidators*”—(Concluded).

(4) Arrangement between Company and liquidators as to exercise of their powers.

A Company about to be wound up voluntarily or in the course of being wound up voluntarily, may, by an extraordinary resolution, enter into an arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised. S. 179. R

8.—“*Any list so settled....to be contributories.*”

List of contributories, evidentiary value of.

The list of contributories settled by a voluntary liquidator is by this section only *prima facie* evidence of liability, whereas an order for call made by the Court in a compulsory winding up is, subject to appeal, conclusive evidence that the money ordered to be paid is due. See S. 155, *supra*. S

9.—“*The liquidators may, at any time....of their liability.*”

(1) Calls in voluntary winding-up, how enforced.

In a compulsory winding-up an order for a call can be enforced in the same manner as an order made in an action pending therein, *i.e.*, the order can be enforced by execution, whereas a call made by a voluntary liquidator can be enforced by action or by an application under S. 182. See S. 166, *supra*; also *per Bovill, C. J. in Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175. T

(2) Enforcement of calls made before winding-up.

A liquidator may enforce the payment of a call made by the directors before winding-up. *Stone v. City and County Bank*, 3 C.P.D. 282; *Hiram Maxim Co.*, 1903, 1 Ch. 70. U

(3) Action for call without notice of appointment to settle list of contributories—Validity of.

Although a voluntary liquidator ought, in general, to give notice to each contributory of the appointment to settle the list, and of the character in which he is included in the list, yet, he is not bound to do so, and want of such notice is no defence to an action for a call. *Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175 at p. 187. Y

(4) Suit by liquidator for unpaid calls—Limitation.

A suit by the liquidator of a Company to recover money due to the Company in respect of unpaid calls on shares is governed by Art. 120 of the Limitation Act and must be brought within six years from the date of default. 70 P. R. 1903. See, also, notes under S. 144, *supra*. Y-1

(5) Calls for adjusting rights between fully paid and partly paid share-holders.

The term contributory includes the holder of fully paid shares, and after the debts of the Company have been paid a call may be made on the holder of partly paid shares for adjusting the rights between them and the fully paid share-holders. See *Anglesea Colliery Co.*, 2 Eq. 379 = 1 Ch. 555 and other cases under S. 157. W

178. Where a Company limited by guarantee and having a capital divided into shares is being wound up voluntarily, any share-capital that may not have been called up shall be deemed to be assets of the Company, and to be a debt due from each member to the Company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators.

Effect of winding-up on share-capital of Company limited by guarantee.

(Note).

Corresponding English Law.

This section and S. 189, *supra*, correspond to S. 123 (3) of the English Companies (Consolidation) Act of 1908. X

179. A Company about to be wound up voluntarily, or in the course of being wound up voluntarily may, by an extraordinary resolution, delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators, or may, by a like resolution, enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised.

Power of Company to delegate authority to appoint liquidators.

Any act done by the creditors in pursuance of such delegated power shall have the same effect as if it had been done by the Company.

(Note).

Corresponding English Law.

This section corresponds to S. 190 of the English Companies (Consolidation) Act of 1908. Y

180. Any arrangement which a Company about to be wound up voluntarily, or in the course of being wound up voluntarily, shall have entered into with its creditors shall be binding on the Company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

Arrangement when binding on creditors.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 191 (1) of the English Companies (Consolidation) Act of 1908. Z

(2) Scope of the section.

The section applies only where a Company is about to be or is in the course of being wound up voluntarily. It does not apply to going Companies. A

General—(Concluded).

(3) Compromise by going Companies.

(a) A going Company has, as an incident to its existence, the same power of compromising claims as an individual has. *Norwich Provident Society*, *Bath's* case, 8 Ch. D. 334. **B**

(b) S. 202, *infra*, confers on the liquidators the same powers of compromising with creditors and debtors of the Company as an individual would have. *Albert Life Assurance Co.*, 6 Ch. 381, 386. **C**

(c) It would thus seem that a going Company can compromise claims in the same way as the liquidator of a Company in liquidation under S. 202, *infra*. **D**

N.B.—S. 120 of the English Companies Act confers on Companies a power to compromise with creditors and members, and this power can be exercised not only in case of liquidation but also where the Company is a going concern.

(4) Essentials of a valid compromise.

The essentials of a valid arrangement under this section are:—

(i) The sanction of an extraordinary meeting, (ii) the consent of three-fourths in number and value of the creditors, and (iii) the approbation of the Court if appealed to. **E**

N.B.—For the essentials of the compromise by the liquidators, see S. 202, *infra*.

(5) Validity of arrangement not assented to by share-holders having no interest in assets.

The assets of the Company in liquidation were not sufficient to leave anything for ordinary share-holders, and an arrangement was made for which the preference share-holders and creditors voted but the ordinary share-holders voted against it. The arrangement was up-held in spite of the dissent of the ordinary share-holders, for, they had no interest in the assets. *Re Tea Corporation*, (1904), 1 Ch. 23. **F**

(6) Meeting of creditors to decide compromises.

When a compromise or arrangement is proposed between a Company in liquidation and its creditors or any class of its creditors the Court may summon a meeting of such creditors or class of creditors and if a majority of three-fourths, in value, of the creditors shall agree to the arrangement or compromise, and the Court sanctions it, it shall be binding on all parties. See S. 203, *infra*. **G**

181. Any creditor or contributory of a Company that has in

Power of creditor or contributory to appeal.

manner aforesaid entered into any arrangement, with its creditors may, within three weeks from the date of the completion of such arrangement appeal to the Court against such arrangement, and the Court may thereupon, as it thinks just, amend, vary, or confirm the same.

(Note).

Corresponding English Law.

This section corresponds to S. 191 (2) of the English Companies (Consolidation) Act of 1908. **H**

182. Where a Company is being wound up voluntarily, the

Power of liquidators or contributories in voluntary winding-up to apply to Court.

liquidators or any contributory of the Company may apply to the Court to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls or in respect of any other matter, all or any of the powers which the Court might exercise if the Company were being wound up by the Court¹. Any such application may be made by motion². The Court, if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede, wholly or partially, to such application³, on such terms and subject to such conditions as the Court thinks fit, or it may make such other order or decree on such application as the Court thinks just.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 193 of the English Companies (Consolidation) Act of 1908.

An application under that section can be made by the liquidator, a contributory or a creditor of the Company. But under the Indian Act the Court has no jurisdiction to entertain an application by a creditor. This was also the English law before the English Companies Act of 1900 came into force.

S. 193 of the English Act does not contain the words "Any such application may be made by motion."

So also the words "or decree" after the words "may make such other order" are not found in the English Act.

I

(2) Object of the section.

The object of the Act is to leave the Company, its contributories, and creditors, if possible to settle their own affairs, without coming to the Court for either a compulsory or supervision order, but to provide under this section the means of access to the Court in the voluntary winding-up, just as in a compulsory winding-up or under supervision. *Ranee's case*, 6 Ch. 104, 115, cited in Buckley, 9th Ed., p. 438. J

N.B.—In a voluntary winding-up a liquidator may apply to the Court to decide any question fairly arising in the winding-up. It is much cheaper to bring it before the Court by way of motion than by an action. See *Per Jessel, M. R. in Re Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

1.—"Where a Company....by the Court."

(1) Who can apply under the section.

An application under the section can be made by the liquidator or by a contributory of the Company, but not by a creditor. Under the corresponding section of the English Act the application may be made by a liquidator, a contributory or a creditor. See *supra*. K

N.B.—All applications to the Court in a voluntary winding-up are to be made under this section. *Re New de Kaap, Ltd.*, (1908) 1 Ch. 589.

1.—“Where a Company....by the Court”—(Concluded).

(2) Liquidator's application.

In general, the application should be made by the liquidator. The Court would not make an order so freely on the application of a contributory as it would on that of a liquidator. *Pennysylog Iron Co.*, 30 L. T. 861=(1874) W.N. 166. L

(3) Contributory's application.

But if some of the share-holders are dissatisfied with a claim allowed by the liquidator against the Company, the liquidator is not bound to bring the matter before the Court. It is for the dissatisfied share-holders, if they think fit, to apply to the Court under this section. *Linseed Victuallers, etc., Co.*, 15 W.R. 917=17 L.T.S. M

(4) Notice to liquidator when necessary.

(a) Where proceedings under the section are initiated by contributories, notice to the liquidator ought to be given as *prima facie* he is, as it were, *dominus litis*, and is presumably the most proper person to conduct the proceedings. See *In re Gold Co.*, 12 Ch. D. 77. N

(b) But if the proceedings are taken against the liquidator himself it may be presumed that he does not desire them to initiate himself, and in such case it is not necessary that he should have notice beyond the notice given by the service of the summons upon him. See 19 B. 88 (92). O

(5) Calls in voluntary winding-up, how enforced.

The liquidator of a Company in voluntary liquidation may enforce the payment of calls by proceeding by an application to the Court under this section, or he may institute a suit to recover the same. The present section is not a bar to the institution of such a suit. See 9 Bom. L.R. 825; see, also, *Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175. P

(6) Suits for calls—Jurisdiction of subordinate Courts.

A suit for a call is not a proceeding under this section and may be instituted in the Court of a subordinate Judge. It need not be instituted “in the principal Court having original civil jurisdiction in the place in which the registered office of the Company is situate.” See 9 Bom. L.R. 825. Q

2.—“Any such application....motion.”

Application under English Law, how made.

Under the English law the application may be made by motion or by originating summons. See *Re New Terras Tin Mining Co.*, (1894), 2 Ch. 344; *Re Union Bank of Kingston-upon-Hull*, (1880), 13 Ch. D. 808. R

3.—“The Court, if satisfied....to such application.”

(1) Jurisdiction of Court over proceedings in voluntary winding-up, extent of.

In the case of a Company in voluntary liquidation, the Court on its aid being invoked by the liquidators or contributories, is enabled by this section to determine questions and exercise powers given by the Act to the same extent as if the Company were being wound up by the Court or under its supervision. The Court will not readily cut down its powers under the section. 19 B. 88 (91); see, also, *Black & Co.'s* case, 8 Ch. 254; 268; *Bank of Gibraltar and Malta*, 1 Ch. 69; *Beaujolais Wine Co.*, 3 Ch. 15, 25; *Star and Garter Hotel Co.*, 28 L.T. 258=(1873), W. N. 74; *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808. S

3.—“*The Court, if satisfied....to such application*”—(Continued).(2) **Court's jurisdiction discretionary.**

The section gives the Court a discretionary jurisdiction. It does not give the applicant an absolute right to call on the Court to exercise its powers.
19 B. 88 (93). T

N.B.—As to the meaning of the expression “just and beneficial” in the section, see *Gold Co.*, 12 Ch. D. 77 and *Metropolitan Bank, Heiron's* case, 15 Ch. D. 139.

(3) **Proceedings against a Company in voluntary liquidation, stay of.**

(a) The passing of a voluntary resolution for winding-up does not, like a compulsory order or a supervision order, stay proceedings, or invalidate distresses or executions, or prevent actions or other proceedings being brought or continued against the Company without the leave of the Court. But the Court may, on an application made under this section, interfere by injunction to restrain an action or other proceeding so as to prevent one creditor from seizing an undue share of the assets for his own benefit. See *Keynshan Co.*, 33 Beav. 123; *Life Association of England*, 34 L.J. (Ch.) 64=10 Jur. (N.S.) 762=12 W.R. 1069; *Peninsular Banking Co.*, 35 Beav. 280; *Walker v. Banagher Distillery Co.*, 1 Q.B.D. 235; *Ross v. Gardden Lodge Co.*, 3 Q.B.D. 235. U

(b) But until a stay is granted, a creditor may proceed with an action against the Company or put in force any attachment, distress, execution or similar proceeding. See Halsbury's Laws of England, Vol. V, p. 638.

(c) The onus of showing a special ground for staying an action is on the liquidator. *Currie v. Consolidated Kent Collieries*, (1906), 1 K.B. 134. U-1

(d) If an action is only threatened but not commenced, the liquidator should apply for a supervision order. Threatened actions cannot be restrained. *Zoedone Co.*, (1883), 53 L.J. (Ch.) 465. Y

(e) The Court will not stay an action if the dispute is as to the liability. But if the liability is admitted and the dispute is only as to the amount, a stay will be granted as the matter will properly be determined in the winding up. *Currie v. Consolidated Kent Collieries Corporation, Ltd.*, 1 K.B. 134 C.A. W

(4) **Costs of application for staying action.**

(a) If a creditor brings an action after notice of the resolution for winding-up, the Court will, unless the action is one which, in its opinion, ought to proceed, restrain the action and require the creditor to pay the costs of the action and the application for stay. See *East Kent Shipping Co.*, 18 L.T. 748; *Freeman v. General Publishing Co.*, (1894), 2 Q.B. 380. X

(b) But if the action be commenced without notice of the winding-up, the creditor will be allowed costs incurred before he had notice of the winding-up, the costs will be added to his debt and can be proved in the winding-up. See *Keynshan Co.*, 35 Beav. 123; *Peninsular Banking Co.*, 35 Beav. 280. Y

N.B.—The Court may, in such a case, while restraining the action require the liquidator, to give access to the proceedings. (*Ibid.*)

(c) An action commenced before the resolution for a voluntary winding-up, may be restrained on the same terms as to costs as in *Keynshan Co.* (33 Beav. 123). See *In re Life Association of England*, 10 Jur. (N.S.) 762=12 W.R. 1069. Z

3.—“The Court, if satisfied....to such application”—(Continued).

(d) If after notice of the winding-up and an offer to allow him to prove for his debt and costs in the winding-up, he proceeds with the action, he will not be allowed his costs of the application to restrain his action, and may, on the other hand, be required to pay the company's costs. *Rose v. Gardden Lodge Co.*, 3 Q.B.D. 235; *Freeman v. General Publishing Co.*, (1894), 2 Q.B. 380. A

(e) In the absence of special circumstances, a creditor who commences an action after the commencement of winding-up will be guilty of incurring costs uselessly, his action will be stayed and he will be required to pay the costs of the action and of the application for stay. *Re East Kent Shipping Co.*, (1868), 18 L.T. 748; *Freeman v. General Publishing Co.*, (1894), 2 Q.B. 380. B

(5) Stay of winding-up proceedings.

Where a Company is in voluntary liquidation the Court that has jurisdiction to wind-up the Company can, under this section, make an order staying all the proceedings in the voluntary winding-up. *Re Condes Co.*, of Chilli, (1892), 36 Sol. Jo. 593; *Re Steamship "Titan" Co.*, (1888), 36 W.R. 347; *Re Schanschieff Electric Battery Syndicate, Ltd.*, (1888), W.N. 166; *Re Steamship Chigwell, Ltd.*, (1888), 4 T.L.R. 308. C

(6) Application for approval of agreement for sale.

Although a voluntary liquidator can sell the property of the Company without the sanction of the Court, he may, if he think fit, apply to the Court under this section to approve the agreement for sale. *Scinde, etc., Bank Corporation*, 15 L.T. 602=(1867), W.N.; *Alexandra Hall Co.*, 16 L.T. 7. D

(7) Other instances of applications under the section.

(a) Applications to raise money, to carry on business, to bring or defend actions, to make and enforce calls, to settle and correct the list of contributories, to enforce payment from them. *Anglesea Colliery Co.*, 1 Ch. 555. E

(b) Those for adjudicating disputed claims, making compromises, declaring dividends, obtaining delivery of Company's books, papers or other property, taxing costs, inspection of books under S. 199, examination under S. 163, for proceedings against delinquent directors and officers under S. 214, for unclaimed dividends and surplus assets, etc., *Yorkshire Fibre Co.*, 9 Eq. 650; *North Brazilian Sugar Factories*, 37 Ch. D. 83; *Heiron's case*, 15 Ch. D. 139; *Alliance Soc.*, 28 Ch. D. 559; *Eclipse Gold Mining Co.*, 17 Eq. 490; *Australian United Gold Mining Co.*, (1877), W.N. 37. F

(c) Those for distribution of assets in specie; for a set-off; for liberty to commence proceedings in the Company's name; for removal of a liquidator. *March v. Martin*, (1880), W.N. 111. *New de Kaop, Ltd.*, (1908), 1 Ch. 589; *White & Co.*, 9 Ch. D. 595. G

(d) Liquidators may present petitions under the section, to obtain the direction of the Court. See *Alliance Society*, 28 Ch. D. 559. H

(8) Cases not within the section.

(a) The Court cannot under this section determine the validity of an amalgamation under S. 204, *infra*. *Imperial Bank of China and Japan*, 1 Ch. 339, cited in *Emdens Winding-up of Companies*, 8th Ed., p. 306. I

3.—“*The Court, if satisfied....to such application*”—(Concluded).

(b) The Court cannot entertain an application to settle a claim outside the winding-up—*e.g.*, a claim against an agent for an account of the Company's property in his hands. *Vimbos, Ltd.*, (1900), 1 Ch. 470. J

(c) The Court cannot stay actions against directors. *New Zealand Bank*, 89 L.J. Ch. 128. K

183. Where a Company is being wound up voluntarily, the liquidators may, from time to time, during the continuance of such winding-up, summon general meetings of the Company for the purpose of obtaining the sanction of the Company by special resolution or extraordinary resolution, or for any other purposes they think fit.

In the event of the winding-up continuing for more than one year, the liquidators shall summon a general meeting of the Company at the end of the first year and of each succeeding year from the commencement of the winding-up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing their acts and dealings, and the manner in which the winding-up has been conducted, during the preceding year.

(Note).

Corresponding English Law.

This section corresponds to S. 194 of the English Companies (Consolidation) Act of 1908. L

184. If any vacancy occurs in the office of liquidators appointed by the Company, by death, resignation, or otherwise, the Company in general meeting may, subject to any arrangement they may have entered into with their creditors, fill up such vacancy; and a general meeting for the purpose of filling-up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the Company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the Company, or in such other manner as may, on application by the continuing liquidator, if any, or by any contributory of the Company, be determined by the Court.

(Note).

Corresponding English Law.

This section corresponds to S. 189 of the English Companies (Consolidation) Act of 1908. M

185. If, from any cause whatever, there is no liquidator acting in the case of a voluntary winding-up, the Court may, on the application of a contributory, appoint a liquidator or liquidators¹. The Court may also, on due cause shown, remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding-up².

Power of liquidators to call general meeting.

Power to fill up vacancy in office of liquidators.

Power of Court to appoint liquidators.

(Notes).
General.

Corresponding English Law.

This section corresponds to S. 186 (viii) and (ix) of the English Companies (Consolidation) Act of 1908. N

1.—“If...liquidator or liquidators.”

(1) Appointment of new liquidator in place of a retiring liquidator.

This section empowers the Court to appoint a liquidator or liquidators in a voluntary winding up, if, from any cause whatever, there is no liquidator acting. Therefore, the Court may, under this section, appoint a new liquidator on the retirement of a liquidator. See *Sheppy Portland Cement Co.*, W.N. 184=68 L.T. 83. O

(2) Appointment of additional liquidators.

(a) The Court may also, on due cause shown, without removing any of the existing liquidators, appoint an additional liquidator. See *Sunlight Incandescent Co.*, (1900) 2 Ch. 728. P

(b) Thus where there are differences between the existing liquidators, an additional liquidator may be appointed. (*Ibid.*) Q

(3) Confirmation of existing liquidator.

When there is any doubt as to the validity of the appointment of a sole voluntary liquidator, the Court may settle the question by confirming him in the office. *Indian Zedene Co.*, 26 Ch. D. 70. R

(4) New liquidators to continue winding up without any directions from Company.

Where new liquidators are validly appointed by the Court under this section, they are bound to take up the winding up, at the point where the old liquidators had left off, and not to call a meeting of the Company to consider what steps should be taken in the matter of the winding up, for the general meeting of the Company has no legal competency to give direction to the liquidators. 16 M.L.J. 537, 30 M. 22. S

2.—“The Court...winding up.”

(1) Removal of liquidators appointed by the Company.

(a) In a voluntary liquidation, the Court can, under this section, remove a liquidator appointed by the Company or by the Court, in a voluntary winding-up, and under S. 194, *infra*, it can remove a liquidator appointed by the Court in a winding-up under supervision. T

(b) Even after making a supervision order, the Court may, by this section and S. 194, *infra*, remove a liquidator appointed by the Company. See *E.P. Pubbrook*, *E.P. Rawlings*, 2 D.J. and S. 343; *United Merthyr Collieries Co.*, 1867, W.N. 99=16 L.T. 170; also *Devonshire Silkstone Coal Co.*, (1878) W.N. 71, 73. U

(c) A liquidator appointed by the Company under S. 177, *supra*, cannot be removed by the Company. He can be removed only by the Court. See 30 M. 22. Y

(2) Appeal against order of removal.

(a) A liquidator may appeal against the order removing him. *Adam Eyton, Limited*, 86 Ch.D. 299. W

(b) But the power to remove liquidators is in the discretion of the Court, and the Court of appeal will not interfere with an order of removal if the Judge has exercised a judicial discretion in the matter. But the cause of removal must be shown. See *E.P. Sheard*, 16 Ch.D. 107; *Urnstone Grange Co.*, 17 Times L.R. 553; *Sir John Moore Co.*, 12 Ch. D. 325, 331; *E.P. Newitt*, 14 Q.B.D. 177. X

2.—“*The Court....winding up*”—(Concluded).

N.B.—Before removing a liquidator the Court will consider the wishes of the share-holders. *British Nation, Ass.* 14 Eq. 492.

(3) Who can apply for removal.

- (a) Having regard to the provisions of S. 182, an application for the removal of a liquidator can be made only by a contributory or co-liquidator, but not by anybody else. See *New de Kaap*, 1908, 1 Ch. 589. Y
- (b) Under the English Law a creditor also can apply. See S. 193 of the English Companies (Consolidation) Act, corresponding to S. 182, *supra*. See, also, *Re New De Kaap Ltd.*, (1908), 1 Ch. 589. Z

(4) “On due cause shown”, meaning of.

- (a) The words—point to some unfitness of the person—it may be from personal character or from his connection with other parties or from circumstances in which he is mixed up—some unfitness in the wide sense of the term; the words do not mean “if the Court shall think fit.” *Sir John Moore Gold Mining Co.*, 12 Ch.D. 325, 331. A
- (b) A liquidator may be removed though no personal misconduct is shown but it must appear that it is desirable in the interests of the liquidation that the particular person should not be liquidator. *Adam Eytton, Ltd., Exp. Charlesworth*, 36 Ch.D. 299; *Oxford Building, etc., Co.*, 49 L.T. 495. B

(5) Due cause for removal—Instances.

- (a) The refusal of a liquidator to take proceedings against directors with whom he is intimate, is a due cause for his removal. *Sir John Moore Gold Mining Co.*, 12 Ch.D. 325. C
- (b) A liquidator may also be removed where creditors to a large amount offer to pay into Court a sum sufficient to meet the claims of other creditors, and desire to have their own nominee to administer the assets. *Adam Eytton, Limited, E.P. Charlesworth*, 36 Ch.D. 299. D
- (c) Or where he has made a profit beyond his proper remuneration. *Devonshire Silkstone Coal Co.*, (1878), W.N. 71. E
- (d) Or where it appears that the debts of the Company will exceed the assets, and the creditors desire the removal of the liquidator appointed by the shareholders. *Oxford Building Society & Co.*, 49 L.T. 495. F
- (e) Where a supervision order has been made, and it appears that the debts of the Company will exceed its assets, the fact that all the Company's creditors desire the removal of a liquidator appointed by share-holders is due cause for his removal. *Oxford Building, etc., Co.*, 49 L.T. 495. G
- (f) A liquidator who goes to a foreign country delegating his powers as liquidator to attorneys, may be removed. *Scotch Granite Co.*, 17 L.T. 533. H
- (g) The Court may remove a sole liquidator who has become of unsound mind, and appoint another in his place. *North Molton Mining Co.*, 1886, W.N. 78=54 L.T. 602=34 W.R. 527. I

(6) Circulation of allegations against liquidators sought to be removed, whether contempt of Court.

A share-holder who applies on behalf of himself and other share-holders for the removal of a liquidator is not guilty of contempt of Court by circulating among share-holders statement of his allegations against the liquidator, and an appeal for their support. *New Gold Exploration Co.*, (1901) 1 Ch. 860. J

186. As soon as the affairs of the Company are fully wound-up¹, the liquidators shall make up an account showing the manner in which such winding-up has been conducted and the property of the Company disposed of: and thereupon they shall call a general meeting of the Company for the purpose of having the account laid before them, and hearing any explanation that may be given by the liquidators.

The meeting shall be called by advertisement specifying the time, place, and object of such meeting, and such advertisement shall be published one month at least previously to the meeting in the manner specified in section 276.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 195 (1) & (2) of the English Companies (Consolidation) Act of 1908.

The English Act contains the words "in the Gazette" after the words "the meeting shall be called by advertisement." K

I.—"As soon....wound-up."

"Fully wound-up," meaning of.

The expression "fully wound-up" means, "as far as the liquidator can wind them up." If the liquidator has disposed of the assets as far as he can realize them, got in the calls as far as he can enforce them, paid the debts as far as he is aware of them and done all that he can do in winding-up, the affairs of the Company shall be deemed to have been "finally wound-up" within the meaning of this section, and this final winding-up may be followed by dissolution of the Company. See *London and Caledonian Insurance Co.*, 11 Ch. D. 140. L

187. The liquidators shall make a return to the Registrar of such meeting having been held, and of the date at which the same was held; and, on the expiration of three months from the date of the registration of such return, the Company shall be deemed to be dissolved¹.

If the liquidators make default in making such return to the Registrar², they shall incur a penalty not exceeding fifty rupees for every day during which such default continues.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 195 (3) & (4) of the English Companies (Consolidation) Act of 1908.

General—(Concluded).

Under the English Act the time within which the liquidator should make the return to the Registrar is one week from the date of the meeting. No such period is fixed by the Indian Act.

Under the English Act the penalty for not making the return in time is £5 a day.

The rule that on the expiration of three months from the registration of the return, the Company shall be deemed to be dissolved is under the English law subject to the proviso that the Court may on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the Company is to take effect for such time as the Court thinks fit. The applicant shall within seven days after the order is made file with the Registrar an office copy of the order, failing which, he shall be liable to a fine not exceeding £5 for every day during which the default continues. See S. 195 (5), Companies (Consolidation) Act. M

1.—“On the expiration... dissolved.”**(1) Date of dissolution, postponement of.**

(a) There is no provision in the Act conferring jurisdiction on the Court to extend the period of three months on the expiration of which the Company shall be deemed to be dissolved. This was also the law under the English Companies Act of 1862. But the English law has now been changed and under the proviso to S. 195 (4) of the English Companies (Consolidation) Act, the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the Company is to take effect for such time as the Court thinks fit. But, even under the Indian Act, as under the English Companies Act of 1862, the Court may, before the expiration of the three months, make an order to stay proceedings in the winding-up on an application under S. 182, *supra*, and thereby postpone the date of dissolution. See *Eastern Investment Co.*, (1905), 1 Ch. 352. N

(b) Provided the application is made before the expiration of the three months, the order of the Court granting the stay is valid though made after the expiry of the three months. *Crookhaven Mining Co.*, 33 Eq. 69. O

(2) Winding-up order after dissolution.

After dissolution the Company ceases to exist, and unless the dissolution is set aside on the ground of fraud, the Court cannot make a winding-up order. *Pinto Silver Mining Co.*, 8 Ch. D. 273; *London and Caledonian Insurance Co.*, 11 Ch. D. 140; *Schooner Paid Coal Co.*, (1888), W.N. 70. P

N.B.—For the consequences of the dissolution of a Company, see notes under S. 159, *supra*.

2.—“If the liquidators... Registrar.”**Time within which return is to be made.**

The section does not fix the period within which the liquidator shall make the return. But the English Act expressly provides that the return shall be made within one week after the meeting. See notes under the head ‘General,’ *supra*. Q

188. All costs, charges, and expenses properly incurred in the voluntary winding-up of a Company including the remuneration of the liquidators, shall be payable out of the assets of the Company in priority to all other claims.⁽¹⁾

Costs of voluntary liquidation.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 196 of the English Companies (Consolidation) Act of 1908. R

3.—“All costs...claims.”

(1) “All other claims,” meaning of.

The expression “all other claims” means all other claims existing at the date of winding-up and does not include debts and liabilities incurred by the liquidator in the winding-up on behalf of the estate. See notes to S. 158, *supra*. S

(2) Mortgage debts payable in priority to general costs of winding-up.

(a) If the Company's property is subject to mortgage it is only the equity of redemption that forms the assets; hence, costs, expenses and charges incurred in the winding-up cannot, except in so far as they have been incurred for the benefit of the mortgagees, be paid in priority to the mortgage debt. *Regent's Canal Iron Works Co., E.P. Grissel*, 3 Ch. D. 411; see, also, *Austrian Printing Union*, (1895), 2 Ch. 891. T

(b) Thus, if the liquidator realizes in the winding-up Company's property which is subject to incumbrances, he is entitled to retain out of the fund the costs of realization and any other costs he may have incurred in preserving the property, in priority to the debt due under the incumbrances, but the other costs of the winding-up including the costs of the winding-up petition, not being incurred for the benefit of the incumbrancers, are to be postponed to their claims. (*Ibid.*) U

(3) Liquidator not personally liable to solicitor for costs.

The liquidator is not personally liable to his solicitor for the costs of winding-up whether the liquidation is compulsory or voluntary. See *True-man's Estate*, 14 Eq. 278; *Anglo-Moravian Co. E.P. Watkin*, 1 Ch. D. 180; *Dominion of Canada Plumbago Co.*, 27 Ch. D. 33. Y

N.B.—As to the order in which the different heads of expenses incurred in the winding-up are payable, see notes to S. 158, *supra*.

189. The voluntary winding-up of a Company shall not be a bar to the right of any creditor of such Company to have the same wound up by the Court¹, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up².

Saving of rights of creditors.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 197 of the English Companies (Consolidation) Act of 1908. The English Act also expressly provides that a contributory can apply, and that an order may be made on his application if the Court is of opinion that the rights of the contributories will be prejudiced by a voluntary winding-up. W

N.B.—As to whether under the Indian Act a contributory can apply for a compulsory order after a voluntary winding-up, see notes, *infra*, under the head 'who can apply for an order.'

(2) Scope of the section.

The section applies not only to cases where the voluntary winding-up commenced before the presentation of the petition, but also to cases where the Company goes into voluntary liquidation after the presentation of the petition and before an order is made. *New York Exchange Co., Ltd.*, 39 Ch. D. 415. X

1.—“The voluntary winding-up...by the Court.”

(1) Who can apply for an order.

(a) The section expressly provides that a creditor can apply, but there is no such express provision enabling contributories to apply. The language of the section follows that of S. 145 of the English Companies Act of 1862. Though that section did not expressly give a contributory a right to apply for a compulsory order, there are several English cases decided under that Act in which such right was recognized. In some cases, it was supposed that a contributory could apply only if the voluntary winding-up was fraudulent, or there were circumstances of suspicion or a searching investigation was needed. It was finally decided that a compulsory order could be made on the petition of a shareholder if the Court was satisfied that the shareholders were likely to be prejudiced and that some benefit would result from a compulsory order, even when the petitioner was a fully paid shareholder. See *Nat-Electric Co.*, (1902), 2 Ch. 34 and other cases cited in Buckley, 9th Ed., at p. 444. Y

(b) If these cases under the English Companies Act of 1862 were rightly decided, it would seem that under the Indian Companies Act a compulsory order may be made on the petition of a contributory in the circumstances in which his right has been recognised in the English cases referred to above. The English Companies Consolidation Act, S. 197, expressly gives the right to a contributory as well as to a creditor. Z

(2) Application when to be made.

The application must be made before the dissolution of the Company unless the dissolution can be impeached on the ground of fraud. *Pinto Silver Mining Co.*, 8 Ch. Div. 273; *London and Caledonian Insurance Co.*, 11 Ch. D. 140. A

2.—“If the Court....voluntary winding-up.”

(1) Discretionary power of the Court.

- (a) An order under the section is in the discretion of the Court. The section is directory and must be read with Ss. 140 and 193, *supra*, and in making the order the Court may have regard to the wishes of the majority of creditors or contributories. *Bishop and Sons* (1900) 2 Ch. 554. **B**
- (b) The Court will allow the voluntary winding-up to proceed if the creditors so desire. See *Lansdale Vale Ironstone Co.*, 16 W.R. 601. **C**
- (c) Or the Court may make a supervision order instead of a compulsory order if it thinks fit, and will do so in cases where there is no fraud or undue influence. *Inns of Court Hotel Co.*, (1866) W.N. 348; *United Merthyr Collieries Co.*, 16 L.T. 170. See S. 191, *supra*: *Omen's Patent wheel Co.*, 29 L.T. 672=22 W.R. 151=(1873) W.N. 226; *Oriental Commercial Bank*, 15 W.R. 7=14 L.T. 755=15 L.T. 8. **D**
- (d) Even after a compulsory order has been made the Court may, at the wish of the majority of creditors change it into a supervision order. *Oriental Commercial Bank*, 15 L.T. 8; *New Oriental Bank* (1892), 3 Ch. 563. **E & F**

(2) Order under the section when will be made.

- (a) A compulsory order will be made if the Court thinks the circumstances of the case are such as to require a compulsory order in order to put in force any of the provisions of the Act which would not be available under a voluntary winding up. *Northumberland Banking Co.*, 2 De. G. & J. 357; and other cases cited in Emden's winding-up of Companies, 8th Ed., p. 30. **G**
- (b) A creditor or contributory who applies for a compulsory order under this section is bound to show that his rights will be prejudiced by the voluntary winding-up. *New York Exchange Ltd.*, 39 Ch. D. 415. **H**
- (c) There would be sufficient prejudice to justify an order if the creditor shows that there are transactions requiring investigation. *Barned's Banking Co.*, 14 W.R. 722; *National Debenture Corporation*, (1891) 2 Ch. 505, 518; *Russel, Cordner & Co.*, (1891), 2 Ch. 171; *Re Varities Ltd.*, (1893) 2 Ch. 235; *Krashapolsky Restaurant*, (1892), 3 Ch. 175; *London and Provincial Starch Co.*, 16 L.T. 474. **I**
- (d) But the transactions must be connected with the promotion or formation of the company or the conduct of its affairs in its own economy, not merely dealings with the outside world in the course of its business. *Medical Battery Co.*, (1894), 1 Ch. 444. **J**
- (e) If the voluntary winding-up is under the control of one man and his family who hold all the shares and whose nominee is a receiver for debenture holders, there is sufficient prejudice to justify an order under this section. *Bishop & Sons*, (1900), 2 Ch. 254. See, also, *Medical Battery & Co.*, (1894) 1 Ch. 444. **K**
- (f) An order may be passed where there has been considerable delay without sufficient reasons in the voluntary winding up. *Manchester Queensland Cotton Co.*, 15 W. R. 1070, *Tramway Wheel Co.*, (1873) W. N. 160. **L**

2.—“If the Court....voluntary winding-up”.—(Concluded).

- (g) Or where the voluntary liquidator does not proceed actively and *bona fide* and acts to the detriment of the creditors or the petitioner. *Tramway Wheel Co.*, (1878), W. N. 160, *Caerphilly Colliery Co.*, 32 L. T. 15.
- (h) Even in the absence of prejudice, a compulsory order may be made, if the general body of creditors desire it. *Bishops*, (1900), 2 Ch. 254, Cf. *Simon's Reef Mining Co.*, 31 W. R. 238. **M**
- (i) As a general rule, a creditor who makes out a case under the section by showing that his rights would be prejudiced by a voluntary winding-up, is entitled *ex debito justitiae* to a compulsory order. See *Universal Drug Supply Association*, 22 W. R. 675=1874 W. N. 125; *General Rolling Stock Co.*, 34 Beav. 314. **N**
- (j) But a creditor who does not show that his rights would be prejudiced by a voluntary winding-up is not entitled to an order *ex debito justitiae*. *Universal Drug Supply Association*, 22 W. R. 675=(1874) W. N. 125. **O**
- (k) Compulsory winding-up may be ordered on the petition of fully paid shareholders when there are surplus assets, even in the absence of fraud, but not where the winding-up would bring nothing to the shareholders. *Re National Company for distribution of Electricity*, (1902) 2 Ch. 34. **P**
- (l) A petition for compulsory order may succeed by impeaching the validity of the resolution. See *Emden's Winding-up Companies*, 8th Ed., p. 32. **Q**
- (m) When there are special circumstances, the Court may make a compulsory order even in supersession, of a supervision order. *Orrell Colliery Co.*, (1879), W. N. 106. **R**
- (3) **Commencement of winding-up, when voluntary winding-up is superseded by compulsory order.**
- When a voluntary winding-up is superseded by a compulsory order, the winding-up will be deemed to have commenced on the date of the presentation of the petition, and not on the date of the voluntary resolution, *Taurine Co*, 25 Ch. D. 250; *New York Exchange*, 39 Ch. D. 415. **S**
- (4) **Adoption of proceedings in voluntary winding-up after compulsory order.**
- (a) Where a voluntary winding-up is superseded by a compulsory order, the Court may, if it thinks fit, by the same or by any subsequent order adopt all or any of the proceedings under the voluntary winding-up. See S. 190, *infra*. **T**
- (b) Even if no order is made under S. 190, a compulsory order will not invalidate all the proceedings in the voluntary winding-up. *Thomas v. Patent Lionite Co.*, 17 Ch. Div. 250; *Cleve v. Financial Corp.* 16 Eq. 363; 380. **U**

190. Where a Company is in course of being wound up voluntarily,

Power of Court to adopt proceedings of voluntary winding-up.

and proceedings are taken for the purpose of having the same wound up by the Court the Court may, if it thinks fit, notwithstanding that it makes an order directing the Company to be wound up by the Court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up (1).

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 198 of the English Companies (Consolidation) Act of 1908. Y

1.—“ *Provide in such order... voluntary winding-up.* ”

(1) Proceedings that may be adopted—Instances.

(a) The Court may under this section adopt the list of contributories settled in the voluntary winding-up, thereby preserving the liability of B contributories who might otherwise escape. *Taurine Co.*, 25 Ch. D. 118, 129, 135, 139. W

(b) The Court may also adopt proceedings under previous winding-up under supervision. *Hertfordshire Brewery Co.*, 43 L.J.Ch. 358. X

(2) Validity of proceedings in voluntary winding-up when no order made under this section.

Even where no order is made under this section a compulsory order made in supersession of a voluntary winding-up would not invalidate all proceedings under the voluntary winding-up. *Thomas v. Patent Lionile Co.*, 17 Ch. D. 250; *Cleve v. Financial Corporation*, 16 Eq. 363, 372, 380. Y

Winding-up subject to the supervision of the Court.

191. When a resolution has been passed by a Comapany to wind up voluntarily ¹, the Court may make an order directing that the voluntary winding-up shall continue, but subject to such supervision of the Court ², and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just.

Power of Court, on application, to direct winding up subject to supervision.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 199 of the English Companies (Consolidation) Act of 1908. But under that Act the jurisdiction of the Court to make a supervision order is limited to cases where the voluntary winding-up is in pursuance of a special or extraordinary resolution. A supervision order cannot be made where the winding-up is in pursuance of an ordinary resolution.

But the Indian Companies Act following the English Companies Act of 1862, enables the Court to make a supervision order whenever a resolution has been passed by a company to wind up voluntarily. That is, under the Indian Act, there is jurisdiction to make a supervision order whether the winding-up is in pursuance of a special, extraordinary or ordinary resolution. Z

1.—“When a resolution . . . voluntarily.”

(1) Irregularity of winding-up resolution.

- (a) A supervision order presupposes an existing voluntary winding-up and cannot be made if the resolution for voluntary winding-up was not properly passed, or if the Company is one which cannot be wound up voluntarily. *Re Bridport Old Brewery Co.*, (1867) Ch. App. 191; *Re Patent Floor Cloth Co.*, (1869) L.R. 8 Eq. 664; *Re Sheffield Mortgage and Estates Co.*, (1897) W.N. 218; *Re Caloric Engine and Siren Fog Signals Co.*, (1885) 52 L.T. 846; *Re Teede and Bishop Ltd.*, (1901) W.N. 52. *National Savings Bank Ass.* 1 Ch. 547. **A**
- (b) The court may however adjourn the petition to enable the share-holders to pass a proper resolution. See *Emden's Winding-up of Companies*, 8th Ed., p. 307. **B**
- (c) If the irregularity in passing the resolution is discovered after the supervision order is made, the order may be discharged on application to the Court of appeal, and the time for making the appeal may if necessary be extended. *Manchester Economic Society*, 24 Ch. Div. 488. **C**
- (d) Or a fresh petition may be presented in the Court of first instance for a compulsory order. *Sheffield Mortgage Co.*, (1887) 1 W.N. 218. **D**

N.B.—But contributories who are aware of the circumstances which have rendered the resolution informal, should not present a petition immediately, but should procure another meeting. *London Flour Co.*, 16 W.R. 552. **E**

(2) Who can apply for a supervision order.

The Act is silent as to who may apply for a supervision order; but such persons as are entitled to apply for a compulsory order are also entitled to a supervision order, namely, the company itself or any creditor or contributory. See *Halsbury's laws of England*, Vol. V., p. 595. **F**

(3) Liquidator's petition.

- (a) The liquidator of a company in voluntary winding-up may, under a power conferred on him in the voluntary winding-up, apply to the Court for a supervision order. *Re Hooker's Cream Milk Co.*, (1879) 23 Sol. Jo. 231. **G**
- (b) “Probably the Court would not now as a rule, accede to such an application unless supported by the creditors, if the company was insolvent, or by the contributories, if the company was solvent, even if it would in any case make an order on the petition of the liquidator alone. *Halsbury's Laws of England*, Vol. V., p. 596. **H**
- (c) But if the company is threatened with actions, the voluntary liquidator can obtain a supervision order so as to obtain the benefit of S. 195, *infra*, as to staying of actions, even though, his petition is opposed by the share-holders. *Zoedone Co.*, 53 L.J. Ch. 463. **I**

N.B.—Threatened actions against a company in voluntary liquidation cannot be restrained. (*Ibid.*)

(4) Contributory's petition.

- (a) As a rule a supervision order will not be made on a contributory's petition unless in passing the resolution for winding-up there has been fraud

1.—“When a resolution...voluntarily”—(Continued).

or the rights of the dissenting minority have been overborne by improper or corrupt influence, or unless the petition is supported by a creditor. See *Bank of Gibraltar and Malta*, (1865) 1 Ch. 69; *Re Gold Co.*, (1879) 11 Ch. Div. 701, 718; *Beaujolais Wine Co.*, 3 Ch. 15; *London and Mercantile Discount Co.*, (1865) 1 Eq. 277. J

N.B.—For the Act creates as between the contributories a domestic tribunal and in the absence of special grounds the Court will not readily interfere with their decision. The object of the Act is to leave the company and its creditors to settle their affairs if possible, without coming to the Court giving them facility to apply to the Court under S. 182, if necessary. See *Langham Skating Rink Co.*, 5 Ch. Div. 669. See, also, *Rance's case*, 6 ch. 104. K

- (b) If the majority of the share-holders desire the continuance of the voluntary winding-up, a supervision order will not be made on a contributory's petition on the only ground that charges of misconduct are made against the voluntary liquidator. *Sir John Moore Gold Mining Co.*, W.N. (1877) p. 183; *Star and Garter Hotel Co.*, 42 L. J. Ch. 374 = 1873 W.N. 74; *Imperial Bank of China India and Japan*, 1 Ch. 339; *Yorkshire Fibre Co.*, (1870) L.R. Eq. 650. L

N.B.—When there are charges of misconduct against the liquidator, the proper course is to remove them, or to bring an action against them. *London Bank of Scotland*, 15 W.R. 1103 = 16 L.T. 783. See, also, *London and Medeterranean Banking Co.*, (1867) 15 W.R. 33 = 15 L.T. 153 = 1866 W.R. 317. M

- (c) A supervision order has however, been made on a share-holder's petition where the only reason for making it was that in a proposed sale of the company's assets the representatives of the new company were much the same persons as those who controlled the liquidation. *Donald v. Eglinton Chemical Co. Ltd.*, (1900) 2 F. (et. of Sess.402) cited in the Halsbury's Laws of England, Vol. V., p. 597. N

- (d) Where a company was insolvent beyond all doubt a supervision order was made on the petition of a share-holder although some of the share-holders wished to continue the business. *Prince of Wales State Quarry Co.*, 18 L.T. 77. O

(5) Creditor's petition.

- (a) S. 182, *supra*, empowers the Court to determine questions arising in a voluntary winding-up on the application of a liquidator or a contributory but not of a creditor. It is otherwise under the present English law. By S. 193 of the English Companies (Consolidation) Act creditors as well as contributories and liquidators are enabled to apply to the Court in a voluntary winding-up. Moreover S. 187 of the same Act requires every liquidator appointed by the company in a voluntary winding-up to summon a meeting of the creditors to determine whether an application should be made to the Court for appointing any person as liquidator in the place of or jointly with the liquidator appointed by the company, and for the appointment of a committee of inspection, and if the creditors so resolve, an application may be made accordingly to the Court, and the Court may grant such application or may make such other order as, having

1.—“When a resolution . . . voluntarily” —(Concluded).

regard to the interests of creditors and contributories, may seem just. By these provisions the occasions for supervision orders have under the English law been considerably reduced.

There is no section in the Indian Act corresponding to S. 187 of the English Act and as pointed above, S. 182 of the Indian Act does not enable creditors to apply to the Court in a voluntary winding-up. Hence it would seem that under the Indian Act, supervision orders of the applications of creditors will be more readily made than under the English law. P

(b) Where there are charges of misconduct against liquidators, a creditor should not apply for a compulsory order, but should apply to change the liquidators. *London and Medeterranean Banking Co.*, 15 W.R. 33=15 L.T. 153=1866 W.N. 317. Q

(c) But if the creditor is prejudiced by the misconduct of the liquidator in voluntary winding-up, as where he shows that the assets are being misapplied, he may obtain a compulsory order under S. 189, *supra*. *Caerphilly Colliery Co.*, 32 L.T. 15. R

(d) Where the company is insolvent beyond all doubt and the creditors desire a supervision order, the Court will not take into account the opposition of the contributories. *Prince of Wales State Quarry* (1868) 18 L.T. 77.S

(6) Claimant for unliquidated damages.

A claimant for unliquidated damages is not a creditor entitled to apply either for a compulsory order or for a supervision order. *Re Peny-van Colliery Co.*, (1877) 6 Ch. D. 477; *Re Milford Docks Co.*, Lister's petition, (1893) 23 Ch. D. 292. The claimant should obtain a judgment on his claim before he can petition. T

(7) Creditor whose debt is incurred after winding-up, whether entitled to an order.

A supervision order was refused on the petition of a creditor whose debt was incurred after voluntary winding-up. *Bank of South Australia* (No. 1), (1894), 3 Ch. 722. U

N.B.—But having regard to *Bank of South Australia* (No. 2), (1895) 1 Ch. 578, where a compulsory order was made on such a petition, the question whether the debt was incurred before or after the voluntary liquidation would seem to be immaterial. See, also, *Crawford v. Couper*, Lim. 4 Fraser, 849. Y

2.—“The Court may make . . . supervision of the Court.”

(1) Courts competent to make supervision order.

A supervision order can be made by a Court that has jurisdiction to make a compulsory order, i.e., by the principal Court having original civil jurisdiction in the place in which the registered office of the company is situate. See S. 130, *supra*. W

(2) Court's discretion as to order.

The Court has under this section absolute discretion as to whether a supervision order shall be made or not; the applicant is not entitled to an order as a matter of right. In deciding between a compulsory winding-up and a winding-up subject to supervision, in the appointment of liquidators and in all other matters relating to the winding-up, subject to supervision, the Court may have regard to the wishes of

2.—“The Court may make....supervision of the Court”—(Continued).

the creditors or contributories as proved to it by any sufficient evidence. See S. 193, *infra*. See, also, *Bank of Gibraltar and Malta*, 1 Ch. 69; *Beaujolais Wine Co.*, 3 Ch. 15; *Owen's Patent Wheel Co.*, 29 L.T. 672=22 W.R. 151=(1873) W.N. 226; *Crawford v. Cowper Lim.*, 4 Fraucher, 849. **X**

(3) Supervision order on petition for compulsory order.

- (a) The court may make a supervision order on a petition for a compulsory order without amending the petition. See, *Buckley*, 9th Ed., p. 447. **Y**
- (b) But the present practice of English Courts is to require amendment and re-advertisement. See practice note, 1902 W.N. 77. **Z**
- (c) The petition may however be treated as amended by praying for a supervision order or *vice versa*. *Emden's Winding-up of Companies*, 5th Ed., p. 308. **A**
- (d) The Court may, at the wish of a majority of creditors and share-holders, make a supervision order and refuse to make a compulsory order, notwithstanding that unpaid creditors ask for a compulsory order. *Owen's Patent Wheel Co.*, 29 L.T. 672=22 W.R. 151=1873 W.N. 226; *Simon's Reef Co.*, 1882, W.N. 173=31 W.R. 238. **B**

(4) Supervision order after compulsory order.

- (a) The court has jurisdiction to make a supervision order even after making a compulsory order. See, *British Soap, etc., Co.*, W.N. 1869, p. 87. **C**
- (b) Thus, where after a compulsory order was made, the company passed a resolution for voluntary winding-up, the Court made a supervision order with the assent of creditors and share-holders. (*Ibid.*) **D**

N.B.—The Court may stay proceedings in a compulsory winding-up in order that a voluntary winding-up may be continued under the supervision of the Court. *Bristol Victoria Pottery Co.*, W.N. (1872), p. 85. **E**

(5) Compulsory order on petition for supervision order.

- (a) Where the petition is for a supervision order, and the petitioner does not consent to a compulsory order, the Court will not make a compulsory order, though the majority of the creditors apply for it. *Chepstow Bobbin Mills Co.*, 36 Ch. D. 569. **F**
- (b) The Court may however in such a case direct the petition to stand over to enable some one else to present a petition for a compulsory order. *Electric Co.*, 1881 W.N. 98=29 W.R. 714=50 L.J. (ch.) 491=44 L.T. 604. **G**
- (c) Or it may substitute another petitioner. *Buckley*, 9th Ed., p. 447. **H**

(6) Service of petition.

- (a) A petition for a supervision order must be served upon the company as well as upon the liquidator. *Inventor's Association*, 13 W.R. 1015=12 L.T. 840=6 N.R. 349; *Petroleum Co.*, 15 W.R. 29=15 L.T. 169. **I**
- (b) If the liquidator joins in the petition it must be served upon the company. *Pannonia Leather Cloth Co.*, 13 W.R. 1015. **J**

(7) Appearance at the hearing.

The company should appear by the liquidator at the hearing of the petition. *Re Hall (A.W.) and Co.*, (1885), W.N. 190; *Re Mont de Piété of England* (1892), W.N. 166. **K**

(8) Supervision order—Form—Practice of English Courts.

It is the practice of the English Courts to make a supervision order in the following form, namely; (1) that the voluntary winding up of the company shall be continued, but subject to the supervision of the

2.—“The Court may make....supervision of the Court”—(Concluded).

Court; (2) that any of the proceedings under the voluntary winding-up may be adopted as the Court shall think fit; (3) that the voluntary liquidator shall, on a named day and thenceforth every three months, file with the Registrar a report in writing as to the position of, and the progress made with, the winding up of the company, and with the realisation of the assets thereof and as to any other matters connected with the winding up, as the Court may from time to time direct; (4) that no bills of costs, charges or expenses or special remuneration of any solicitor employed by the liquidator, auctioneer, broker or other person shall be paid out of the assets of the company—unless costs, charges, expenses or remuneration shall have been taxed or allowed by the registrar; (5) that all such costs charges, expenses and remuneration be taxed and ascertained accordingly; (6) that the costs of the petitioner and of persons appearing at the hearing shall be dealt with as directed; and (7) that the creditors, contributors and liquidators of the company and all other persons interested are to be at liberty to apply generally as there may be occasion. Halsbury's Laws of England, Vol. V, pp. 597, 598. **L**

(9) Winding up under supervision—Date of commencement.

(a) As a supervision order merely continues the voluntary winding up subject to the supervision of the Court, the making of the order does not alter the date of the commencement of the winding up. The winding-up, therefore, commences on the date of the resolution and not on the date of the presentation of the petition. See *Emden's Winding up of Companies*, 18th Ed., p. 137, Buckley, 9th Ed., p. 421. **M**

(b) The date of commencement is not affected by the fact that the supervision order is made on a petition for a compulsory order, presented before the company passes a resolution for voluntary winding up. *West Cumberland Iron and Steel Co.*, (1889), 40 Ch. D. 361. **N**

(c) Nor is it altered by the fact that a provisional liquidator has been appointed previous to the passing of the resolution. (*Ibid.*) **O**

N.B.—A supervision order relates back for all purposes, including the stopping of interest, to the date of resolution, and this, though interest have been paid up to a later date in the voluntary winding up. *E. P. Colborne and Strawbridge*, 11 Eq. 478, cited in Buckley 9th Ed., p. 421. **P**

(d) If the voluntary winding up is in pursuance of a special resolution, the winding up commences on the date of the confirmatory resolution. *Weston's case*, (1868) 4 Ch. App. 20; *Emperor Life Assurance Society*, (1885) 31 Ch. D 78; *Dave's case* (1878), L.R. 6 Eq. 232; *Ottomon Co.*, *Hornby's case* (1868) 37 L.J., (Ch.) 929; *Imperial Land Co. of Marseilles*, *E.P. Colborne and Strawbridge*, (1871) L.R. 11 Eq. 478. **Q**

(10) Date of commencement when supervision order is superseded by compulsory order.

If a supervision order is superseded by a compulsory order, date of the commencement of the winding up is the date of the presentation of the petition and not the date of the resolution. See *Taurine Co.*, 25 ch. D. 118. **R**

N.B.—In such case the making of the compulsory order has not the effect of vitiating all the proceedings taken under the voluntary winding up. *Thomas v. Patent Lionite Co*, 17 Ch. D. 250. **S**

192. A petition praying wholly or in part that a voluntary winding-up shall continue, but subject to the supervision of the Court, and which winding-up is hereinafter referred to as a winding-up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding-up the Company by the Court ¹.

Petition for winding-up subject to supervision.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 200 of the English Companies (Consolidation) Act of 1908.

Instead of the words "A petition praying.....hereinafter referred to as a winding-up subject to the supervision of the Court", the English Act contains the words "A petition for the continuance of the voluntary winding-up subject to the supervision of the Court." T

1.—"For the purpose....by the Court."

(1) Action against Company wound up subject to supervision—Stay of.

(a) Under this section and S. 195 read with S. 134, *supra*, the Court has jurisdiction to stay actions and proceedings against a company at any time after the presentation of a petition for a supervision order is made.

(b) So also, after a supervision order is made no action shall be commenced or continued against a company except with the leave of the Court. Compare Ss. 195 and 136. U

(2) Action by company—Judgment for defendant—Costs.

If an action commenced by a company before winding up is continued with the permission of the Court by the liquidators after a supervision order is made, and judgment is given for the defendant with costs, the costs are payable in full though the order granting permission to continue the action, is silent on the subject. *London Drapery Stores*, (1898) 2 ch. 684. Y

193. The Court may, in determining whether a Company is to be wound up altogether by the Court, or subject to the supervision of the Court, in the appointment of a liquidator or of liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned, held and regulated in such manner as the Court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court.

Court may have regard to wishes of creditors.

In the case of creditors, regard shall be had to value of the debts due to each creditor, and, in the case of contributories, to the number of votes conferred on each contributory, by the regulations of the Company.

(Notes).

General.

(1) **Corresponding English Law.**

This section corresponds to Ss. 201 and 219 of the English Companies (Consolidation) Act of 1908. W

(2) **Application of the section.**

This section is especially applicable where an application for a winding-up order is made, not by creditors, but by share-holders under the circumstances mentioned in clauses (a), (b), (c), and (d) of S. 128, *supra*. See *per Slewyn, L.J.*, in *London Flour Co.*, 16 W.R. 552 = 19 L.T. 186. X

N.B.—For a collection of cases under the corresponding section of the English Act as to supervision orders, see Buckley, 9th Ed., pp. 448 to 450. Y

Power to Court to appoint additional liquidator in winding-up subject to supervision.

194. Where any order is made by the Court for a winding-up subject to the supervision of the Court, the Court may, in such order or in any subsequent order, appoint any additional liquidator ¹.

Any liquidator so appointed by the Court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position, as if he had been appointed by the Company ².

The Court may, from time to time, remove any liquidator so appointed by the Court ³, and fill up any vacancy occasioned by such removal, or by death or resignation,

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 202 of the English Companies (Consolidation) Act of 1908, except that S. (202) sub-sec. 3 of the English Act which corresponds to the last para of this section contains the word, (not found in the Indian Act), "*or any liquidator, continued under the supervision order*" after the words "any liquidator so appointed by the Court" and before the words "and fill any vacancy.....resignation." Z

1.—The Court may in such order....additional liquidator."

(1) **Voluntary liquidator—Continuance of powers after supervision order.**

"The Voluntary liquidator remains in office unless otherwise provided in the supervision order." Emden's Winding-up of Companies, 8th Ed., p. 311. A

1.—“The Court may in such order....additional liquidators” —(Concl'd.).

(2) Appointment of liquidator by Court in absence of voluntary liquidator.

If the contributories of a company that is wound up voluntarily do not appoint a liquidator at the proper time, the Court may appoint one on making a supervision order, and the Court of appeal will not interfere with the discretion of the Court below in making such appointment. *London Quays and Warehouses Co.*, 3 Ch. 394. **B**

(3) Appointment of additional liquidator—Discretion of Court.

(a) The appointment of additional liquidators is in the discretion of the Court and in exercising its discretion the Court will have a proper regard to the interests of all parties concerned and will consider how far such an appointment will facilitate or retard the winding up. In making the appointment the Court may have regard to the wishes of the creditors and contributories. See S. 193, *supra*. **C**

(b) The Court may refuse to appoint an additional liquidator on the ground that owing to a hostile feeling between the parties such an appointment would lead to litigation and expense, and if more than one person were appointed would lead to the person originally appointed being outvoted. *London Quays Co.*, 3 Ch. 394 cited in Emden's Winding up of Companies, 8th Ed., p. 311. **D**

N.B.—After a supervision order has been made it is competent for the shareholders to meet and resolve on the appointment of a new liquidator in order to inform the Court of their wishes. *Montrotier Asphalte Co.*, (1874) W.N. 172. **E**

2.—“Any liquidator....by the Company.”

(1) Delegation of powers to one of several liquidators.

Where several liquidators are appointed the Court had jurisdiction to give the conduct of any particular matter arising in the winding up to one of them. *Midland Land Corporation*, W.N. (1887) 58. **F**

(2) Security from additional liquidator.

An additional liquidator appointed by the Court in a winding up subject to supervision will be required to give security though no security was taken from the voluntary liquidator appointed by the Company. *Hampshire Land Co.*, (1894) 2 Ch. 632, *not following European Bank, E.P. Paul*, 19 W.R. 268 in which it was decided that if no security was taken by the company from the voluntary liquidator, the Court need not take any from substituted liquidators appointed by it. **G**

N.B.—The present practice of the English Courts is to take security from all liquidators whether (additional or substituted) appointed by the Court. See Buckley, 9th Ed., p. 450; see, also, Emden's Winding up of Companies, 8th Ed., p. 312.

3.—“The Court may, from time to time....by the Court.”

Removal of liquidators.

(a) Under this section the Court has jurisdiction to remove liquidators appointed by it in a winding up subject to supervision, and S. 185, *supra* enables the Court to remove liquidators appointed by the company or the Court in a voluntary winding up. **H**

2.—“The Court may, from time to time....by the Court”—(Concluded).

- (b) In the discharge of his duties, a liquidator whether appointed by the Company or by the Court, is subject to the control of the Court and cannot be removed from office except by the Court. See 30 M. 22. I
- (c) A liquidator may be removed without any proof of personal misconduct or unfitness if his removal will conduce to the more efficient winding up of the Company. *Marseilles Extension, etc., Co.*, 4 Eq. 692; see, also, *Adam Eytton Limited*, 36 Ch. Div. 299; *British Native Assurance Society, E.P. Handerson*, 14 Fq. 492. J
- (d) Where the debts exceed the assets the fact that all the creditors desire the removal of a liquidator appointed by the share-holders is a sufficient cause for his removal. *Oxford Building Co.*, 49 L.T. 495. K

195. Where an order is made for a winding-up subject to the supervision of the Court, the liquidator appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the Company were being wound up altogether voluntarily¹.

Effect of order of Court for winding-up subject to supervision.

Save as aforesaid, any order made by the Court for a winding-up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding-up the Company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding-up the Company altogether by the Court².

In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidators the expression “official liquidator” shall be deemed to mean the liquidator conducting the winding-up subject to the supervision of the Court.

(Notes).**General.****(1) Corresponding English Law.**

This section corresponds to S. 203 of the English Companies (Consolidation) Act of 1908.

The English Act nowhere uses the expression ‘official liquidator’ to denote the liquidator of a company in a compulsory winding up, and there is therefore no provision in the English Act corresponding to the last para of this section. L

(2) Winding up under supervision how far differs from voluntary winding up.

So far as the Court does not interfere a winding up under supervision remains essentially a voluntary winding up. But the Court in a winding up under supervision has full authority to interfere and to exercise to

General—(Concluded).

any extent the powers which it might have exercised if an order had been made for winding up the company by the Court. In effect, a winding up under supervision may be hardly distinguishable from a purely voluntary winding up or hardly distinguishable from a winding up by the Court. 6 B. 640 (643). M

1.—“The liquidator appointed...altogether voluntarily.”

(1) Liquidator—Restrictions on the powers of.

(a) The Court may, in a winding up subject to supervision, impose restrictions on the liquidator so as to place him in the position of a liquidator in a compulsory winding up or it may relax the restrictions according to the requirements of each case. (*Re Watson and Sons*, (1891), 2 Ch. 55). N

(b) Thus, in *Re London Quays and Warehouses Co.*, 3 Ch. 394 the liquidator was appointed “to conduct the winding up of the company, subject to such restrictions as an official liquidator would in a compulsory winding up be subject to, except so far as the Court may, upon an application for that purpose, modify or dispense with such restrictions in any case or class of cases.” See, also, *Watson and Sons*, (1891), 2 Ch. 55.

Semble :—Restrictions will not be imposed in the absence of a necessity for doing so. *Owen's Patent Wheel Co.*, 22 W.R. 151=29 L.T. 672= (1873) W.N. 226. O

N.B.—For the converse case of an official liquidator being empowered to act without the previous sanction of the Court. See *Rochdale Property Co.*, 12 Ch. D. 775. P

(2) Liquidator's power to compromise without Court's sanction.

(a) In the absence of any restriction imposed by the Court the liquidator of a company that is wound up subject to the supervision of the Court, may exercise the power conferred by S. 180, *supra*, upon a voluntary liquidator and may, without the sanction of the Court, enter into compromise with the creditors of a company. *Anglo-Romans Water Co.*, *Wright's case*, 5 Ch. 437. Q

(b) Though S. 180 *supra*, in terms applies to voluntary winding up only, still, it would seem that under the present section a liquidator under supervision could also exercise the powers. (*Ibid.*) R

N.B.—(i) The provisions of Ss. 202 and 203 are only cumulative and do not restrict the right of the liquidator to enter into any compromise which in a purely voluntary winding up might have been entered into with the sanction of a general meeting. (*Ibid.*) S

(ii) In important matters the liquidators should apply to the Court for sanction. *Emden's Winding up of Companies*, 8th Ed., p. 313. T

(3) Settling list of contributories and making calls.

After a supervision order, liquidators may settle the list of contributories and make calls as in a voluntary winding up, or if they think it desirable, they may apply to the Court to settle the list and to make the calls. *Emden's Winding up of Companies*, 8th Ed., p. 314. U

N.B.—A person whose name has been placed on the list of contributories may apply to the Court to have his name taken off the list or to put some other contributory on it. *Emden's Winding up of Companies*, 8th Ed., p. 314. Y

1.—“*The liquidator appointed....altogether voluntarily*”—(Concluded).

- (4) **Compromise by directors after supervision order, with liquidator's sanction—Validity of.**

After a supervision order directors cannot compromise with a contributory so as to release him from liability. The liquidators cannot recognize such release and validate it without first obtaining the sanction of the Court, *James v. May*, L.R. 6 H.L. 328. **W**

- (5) **Rectification of register.**

It is doubtful whether in a winding up under supervision, the liquidators have power to rectify the register without the sanction of the Court. *Gilbert's case*, 5 Ch. 559. **X**

- (6) **Distribution of assets after supervision order.**

When a supervision order has been made, the provisions applicable to the distribution of assets are those contained in S. 177 and not those of S. 147, for, a voluntary winding up with a supervision order has, in all respects, the same operation as if it had been originally a compulsory order, and in the distribution, secured creditors have priority over unsecured creditors. 55 P.R. 1907. **Y**

2.—“*Save....altogether by the Court.*”

- (1) **Stay of actions.**

Like a compulsory order, a supervision order operated as an automatic stay of all proceedings against the Company, and after such order, no action or proceeding shall be commenced or continued except by leave of the Court. See S. 136, *supra*. **Z**

- (2) **Proof of debts—Payment of dividends.**

- (a) “Dividends can be paid by the liquidators as in a voluntary winding up, or after adjudication by the Court; applications can be made for liberty to declare the dividends as in a winding up by the Court.” *Emden's Winding up of Companies*, 8th Ed., pp. 313, 314. **A**
- (b) A person who seeks to prove for a debt must allege and prove that he is a creditor at the date of his proof for the amount he seeks to recover. He cannot prove for more than what is actually due to him at the time of proof. The date of the commencement of winding up is immaterial. *Oriental Commercial Bank, Exp. Masoudof*, 6 Eq. 582. **B**
- (c) Thus, a person who holds acceptances of the company can, if he has received anything from other parties, prove only for the balance, and this is so even where the part payment was made after the commencement of the winding up. (*Ibid.*) **C**

- (3) **Court's power to sanction arrangement without special resolution under S. 204.**

Where the winding up is subject to supervision, the Court can, without any special resolution, sanction an arrangement, which, in the case of a purely voluntary winding up, could be made only by a special resolution under S. 204 *infra*, *Cambrian Mining Co.*, 48 L.T. 114. **D**

- (4) **Termination of winding up under supervision.**

- (a) As a general rule a winding up under supervision should be terminated in the same manner as a purely voluntary winding up, i.e., under Ss 186 and 187. 6 B. 640. **E**
- (b) Though the Court has power under this section to make an order dissolving a company in the work of winding up subject to supervision, such

2.—“*Save....altogether by the Court*”—(Concluded).

cases must be exceptional and can only occur when the Court has deemed it proper to carry on the winding up under supervision in a manner such as closely to approximate to a winding up by the Court. The ordinary rule is, the other way: generally a winding up under supervision is not conducted under so intimate a control of the Court as to put the Court in a position to judge of the correctness of the liquidator's action and the completeness of the winding up. In the absence of special grounds the Court will not interfere. 6 B. 640 (644). F

196. Where an order has been made for the winding-up of a

Appointment in certain cases of voluntary liquidators to office of official liquidators.

Company subject to the supervision of the Court, and such order is afterwards superseded by an order directing the Company to be wound up compulsorily¹, the Court may, in such last-men-

tioned order or in any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidators.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 204 of the English Companies (Consolidation) Act of 1908. But that section applies only where the winding-up is in Scotland or Ireland. G

1.—“*Such order is afterwards....compulsorily.*”

(1) Compulsory order superseding supervision order, when will be made.

(a) An existing winding-up under supervision is no bar to the obtaining of a compulsory order, for, if the Court is satisfied that the winding-up cannot be continued with due regard to the interests of the creditors or contributories, an order for a compulsory winding-up may be made on the petition of any creditor or contributory or probably by the company itself acting by its voluntary liquidator. See Halsbury's Laws of England, Vol. V, p. 417. Also *Re London and Mediterranean Bank*, (1866) 15 L.T. 153. H

(b) But in order that a supervision order may be superseded by a compulsory order the circumstances must be very special. *Orrell Colliery Co.*, (1879) W.N. 106. I

(c) It is not a sufficient reason that there are charges of misconduct against the liquidators. *London and Mediterranean Bank*, 15 L.T. 153. J

2) Compulsory order in supersession of supervision order, how made.

A compulsory order superseding a supervision order may be made not by way of appeal but upon a petition for a compulsory order presented subsequent to the supervision order. *London and Mediterranean Bank*, (1866) W.N. 317=15 L.T. 153=15 W.R. 33, cited in Buckley, 9th Ed., p. 452. K

N.B.—As to the commencement of winding-up when a voluntary winding-up, or a winding-up under supervision, is superseded by a compulsory order, see notes to S. 191, *supra*.

Supplemental Provisions.

197. Where any Company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property of the Company¹, and every transfer of shares² or alteration in the status of the members³ of the Company, made between the commencement of the winding-up and the order for winding-up shall, unless the Court otherwise orders, be void.

Dispositions after commencement of winding-up avoided.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 205 (2) of the English Companies (Consolidation) Act of 1908. But that section applies to all dispositions, transfers and alterations of status made at any time after the commencement of the winding-up whether before or after the winding-up order is made. The Indian Act, on the other hand, following S. 153 of the English Companies Act of 1862, affects only transactions between the commencement of the winding-up and the date of the order. It does not affect transactions subsequent to the winding-up order.

The English Act contains the words "including things in action" after the words, "dispositions of the property," and before the words "of the company."

K-1

(2) Meaning and effect of the section.

Where a petition is presented and an order is subsequently made upon it, all dispositions of property, transfers of shares, and alterations in the status of members between the date of the petition and the date of the order are rendered void. The words of this section are wide enough to prevent an improper dissipation of the property. But the Court has under the last words a discretion to uphold all proper transactions. Without such a discretion a petition, whether well founded or not, might paralyze the trade of the company and work its ruin. In the case of a voluntary winding up no such considerations arise as the winding-up originates in the voluntary action of the share-holders. Buckley, 9th Ed., pp. 453, 454.

L

(3) Sanction of Court, when to be given.

It is not necessary that the sanction of the Court should be given at the time of the transaction. It may be given subsequently. *Gibbs and West's* case, 10 Eq. 312, 324.

M

1.—"All dispositions...of the Company."

(1) What dispositions will be upheld by Court.

(a) In the exercise of the discretion given by this section the Court will uphold transactions *bona fide* entered into in the ordinary course of trade and completed before the winding-up order. *Wiltshire Iron Co., Ltd. v. Pearson*, 3 Ch. 443.

N

(b) Thus, a charge upon calls *bona fide* given by the directors to a banker between the commencement of winding-up and the order has been sanctioned and confirmed. *Gibbs and West's* case, (1870) 10 Eq. 312. O

I.—“All dispositions....of the Company”—(Continued).

(c) Similarly, where after the presentation of a petition of which the Company was aware, a person in ignorance of the petition entered into a contract with the company for the purchase of iron, and before the winding-up order he paid the purchase money and obtained delivery of the iron, the transaction was confirmed by the Court. *Wiltshire Iron Co., E.P. Pearson*, 3 Ch. 443. P

(d) Again a creditor who received payment in ignorance of the presentation of the petition, the morning after the advertisement of the petition in the gazette, was allowed to retain the money paid. *National Bank's case*, (Eur. Arb.) L.T. 92. Q

N.B.—In this case the payment was made under circumstances in which notice of the commencement of the winding-up could not be imputed to the creditor.

(e) But the Court will not validate the payment of a debt to a creditor who has or must have notice of the commencement of the winding-up, though the debt is a *bona fide* one. *Civil Service Stores*, 57 L.J. Ch. 119. See, also, *Brown and Tyden's case*, (Eur. Arb.) L.T. 163=18 Sol. J. 781. R

N.B.—“To do so would be against a cardinal principle of the Act, *viz.*, *pari passu* distribution.” Buckley, 9th Ed., p. 455. S

(f) A creditor presented a petition; the company paid him a part of the debt and promised to pay the balance on a future day; the petition was adjourned. The company having failed to pay the balance on the day fixed, the creditor proceeded with his petition and an order was made on his petition and another petition. The creditor was compelled to repay the money already paid to him. *Liverpool Civil Service Association, E.P. Greenwood*, 9 Ch. 511. T

N.B.—If the creditor has received payment and dismissed his petition, it would have been a different matter: for, the date of commencement of the winding-up would have been altered. See Buckley, 9th Ed., p. 456; see, also, *E.P. Boucherd*, 12 Ch. Div. 26. U

(2) Liability of directors who make improper payments.

Directors who make payments out of the company's assets after the presentation of the petition do so at their own risk, and are personally liable to the company for the moneys paid away if the payments are improper. *Neath Harbour Smelting and Rolling Works*, (1887), 56 L.T. 727=(1887) W.N. 87, 121; *Civil Service Stores*, 57 L.J. (Ch.) 119. V

(3) Transactions not completed before order, not within the section.

(a) If a transaction is not completed before the date of the winding-up order and rests only in contract, the section does not apply, and the Court has no discretion to order it to be performed. *Wiltshire Iron Co., E.P. Pearson*, 3 Ch. 443. W

(b) Thus, if a purchaser under a contract of sale does not acquire title to the property before the date of the winding-up order, he can only prove for damages. (*Ibid.*). See, also, *Oriental Bank Corp. Exp. Guillemin*, 28 Ch. D. 634. X

(c) Where between the date of petition and the date of the order, a contract was *bona fide* entered into with a distant foreign branch of the company by persons who had no notice of the winding-up petition, it

1.—“All dispositions... of the Company”—(Concluded).

was held that the contract was not invalid but that the creditors could only prove for damages. (*Ibid.*) Y

(4) Payment of debt to company.

(a) The section applies only to dispositions by the company of its property, and does not forbid payments to the company or a transfer of shares to it. *Mersey Steel, etc., Co. v. Naylor Benzon and Co.*, 9 A.C. 434; *Contract Corp.*, 3 Ch. 105. Z

(b) Thus, after the presentation of a petition and before a winding-up order is made, a debtor may pay his debt to the company and get a valid discharge for it. *Mersey Steel Co. v. Naylor Benzon and Co.*, 9 A.C. 434. A

(5) Acceptance of bill of exchange not within the section.

The acceptance of a bill of exchange by a director is not a disposition of the property within the meaning of this section. *Bolognesi's case*, 5 Ch. 567. B

(6) Registration of transfer, not a disposition of property.

Where a company took in a transfer of shares in another company and applied for the registration of the transfer, and between the date of transfer and the date of registration a petition for winding-up the transferee-company was made, and a winding-up order was subsequently made on the petition, the registration was held not affected as not being a disposition of the property within the meaning of the section. *Barned's Banking Co., E.P. Contract Corporation*, 3 Ch. 105, cited in Buckley, 9th Ed., p. 456. C

(7) Disclaimer by trustee in bankruptcy.

Notwithstanding this section it seems that a trustee in bankruptcy can disclaim after winding-up. *West of England Bank, E.P. Budden*, 12 Ch. D. 288, cited in Buckley, 9th Ed., p. 456. D

2.—“Every transfer of shares.”

(1) Transfer of shares—When will be sanctioned by Court.

The court may, in the exercise of its discretion, confirm *bona fide* transfers of shares made in ignorance of the petition and completed before the winding-up order. But it will not enforce an incomplete contract for purchase of shares. *Emmerson's case*, 2 Eq. 231; *E.P. Watkins*, 14 L.T. 696=14 W.R. 817. E

(2) Transfer after commencement of winding-up—How far void.

By this section transfers of shares made after the presentation of petition are void only so far as regards any effect to be given them by or against the company. But as between the transferor and the transferee the validity of the transfer is not affected by the Act. *Rudge v. Bowman*, L.R. 3 Q.B. 689; *Onward Building Society*, (1891) 2 Q.B. 463; *Chapman v. Shepherd*, 2 C.P. 228. F

N.B.—But the transferee cannot get himself registered as owner without the sanction of the Court, the power of rectification of the registration being discretionary; the court will not give sanction for registering the transferee as owner unless for strong reasons and for the benefit of the company and those interested in its assets. *Onward Building Society*, (1891) 2 Q.B. 463, 485; *Discoverer's Finance Corporation*, *Lindlar's case*, (1910) 1 Ch. 312. G

2.—“Every transfer of shares”-(*Concluded*).

(3) Contracts for transfer of shares not completed before order, validity of.

- (a) A contract for the purchase of shares entered into but not completed before the commencement of winding-up is not rendered void by the presentation of the petition.

As between the parties it is valid though the court cannot enforce it. *Chapman v. Shepherd; Whitehead v. Izod*, L.R. 2 C.P. 228. H

- (b) So also is a contract entered into after the presentation of the petition but not completed before the order. *Rudge v. Bowman*, L.R. 3 Q.B. 689. I

(4) Transfer of debentures.

The section prevents transfer of shares but does not render void a transfer of debentures after the presentation of the petition. *Goy and Co.*, (1900) 2 Ch. 149, 155. J

3.—“Alteration in the status... of the members.”

(1) Arrangement involving alteration of status.

If, after a petition presented a share-holder advances money to the company on the arrangement that the payment is to be treated as a loan if the company is able to continue its business, but if the company were wound up it should be taken as paid on the shares, the arrangement is invalid, as it involves an alteration in the status of the member. The person would not be allowed to treat the sum as the amount paid on his shares. *Oriental Commercial Bank, Barges' case*, 5 Eq. 420. See, also, *London Suburban Bank, Walmesley's case*, 15 Eq. 274. K

(2) Transfer of shares to an infant, invalid.

- (a) A transfer of shares to an infant is invalid, for, an infant is incapable of entering into a contract. See S. 11, Indian Contract Act (IX of 1872). See, also, 7 C.W.N. 441=30 C. 539=30 I.A. 114 (P.C.); 26 A. 342; 28 B. 181. L

- (b) Though under the English law, a contract with an infant is not void, but only voidable at the option of the infant, still if an infant transferee has not attained majority at the commencement of the winding-up, his status as an infant at that date cannot be changed, and the fact that the infant has attained majority and expresses a wish to retain the shares, would not relieve the transferor of his liability to be placed on the list of contributories. See *Castello's case*, 8 Eq. 504; *Symon's case*, 5 Ch. 298. M

(3) Registration after presentation of petition—Effect of.

The registration of a company after the presentation of a petition to wind it up, though before an order is made, is a nullity and the company cannot be wound up as a registered company. *Hercules Insurance Co.*, 11 Eq. 321. N

N.B.—For transactions amounting to fraudulent preference, see S. 213 and notes thereto.

198. Where any Company is being wound up, all books, accounts and documents of the Company and of the liquidators shall, as between the contributories of the Company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

Books of Company to be evidence.

(Notes).

General.

(1) Corresponding English law.

This section corresponds to S. 220 of the *English Companies (Consolidation) Act of 1908*, except that, instead of the words 'books, accounts and documents', the English Act contains the words 'books and papers.' These words include accounts, deeds, writings and documents. See S. 285 of the Consolidation Act. **O**

(2) Application of the section.

The section applies whether the winding-up is compulsory, voluntary, or under supervision. (1898), 1 Q.B. 754. **O-1**

(3) Evidentiary value of company's books.

(a) Under this section the company's books are *prima facie* evidence of the correctness of the statements therein contained and a claim against the company may be established by entries contained in the minute book. See *Teignmouth and General Mutual Shipping Association, Martin's claim*, (1872) L.R. 14 Eq. 148. **P**

(b) The books of the company are however, only *prima facie* evidence of the truth of the matters therein recorded and a contributory is not precluded from showing that the books are not correct. *Barangah Oil Co., Arnot's case*, 86 Ch. D. 702, 712; *Great Northern Salt and Chemical Works, Ex parte Kennedy*, (1890) 44 Ch. D. 472. **Q**

(c) But the *onus* of proving the incorrectness lies upon the contributory. (*Ibid.*)

(d) By S. 60, *supra*, the register of members is *prima facie* evidence of any matters directed or authorized by this Act to be therein inserted. **R**

(4) Documents relating to company's business—Liquidator's right to possession.

As against a company's mortgagee, the liquidator is entitled to the custody of such books and documents of the company as relate to its management and business and are not necessary to support the mortgagee's title. *Engel v. South Metropolitan Brewing Co.*, (1892) 1 Ch. 442. **S**

199. Where any Company has been wound up under this Act and is about to be dissolved¹, the books, accounts, and documents of the Company and of the liquidator may be disposed of in the following way, that is to say, where the Company has been wound up by, or

Disposal of books, accounts, and documents of Company.

subject to the supervision of, the Court, in such way as the Court directs, and, where the Company has been wound up voluntarily, in such way as the Company by an extraordinary resolution directs².

But, after the lapse of five years from the date of such dissolution, no responsibility shall rest on the Company or the liquidators, or any one to whom the custody of such books, accounts and documents has been committed, by reason that the same or any of them cannot be made forthcoming to any party or parties claiming to be interested therein³.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 222 of the English Companies (Consolidation) Act of 1908, except that instead of the words "books, accounts, and documents" the English Act uses the words "books and papers."

1.—"Where any company... dissolved."

Dissolution of company.

- (a) As to when a company is deemed to be dissolved, see Ss. 159 and 187, *supra*.
- (b) In the case of a winding-up under supervision though the court has jurisdiction to make an order of dissolution as in the case of a company compulsorily wound up, it would not, in the absence of special circumstances, make such order. A winding-up under supervision should generally terminate in the same manner as a purely voluntary winding-up under Ss. 186 and 187, *supra*. See 6 B. 640. T

2.—"In such way... extraordinary resolution directs."

Extraordinary resolution—Definition.

A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at any general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. See Ss. 173, 77, *supra*. U

N.B.—The requirement of an extraordinary resolution involves this—that, under Ss. 173 and 77 the meeting must have been duly convened in the manner prescribed by the articles. See Emden's Winding up of Companies, 8th Ed., p. 288. V

3.—“*But, after the lapse....interested therein.*”**Documents in custody of liquidator, production of.**

If after dissolution the books of the company have not been disposed of under this section, a liquidator may in an action to which he is party, be required to produce such of the documents as are in his custody. *London and Yorkshire Bank v. Cooper*, 15 Q.B.D. 473. W

200. Where an order has been made for winding up a Company by the Court, or subject to the supervision of the Court ¹, the Court may make such order for the inspection by the creditors and contributories of the Company of its books and papers as the Court thinks just ², and any books and papers in the possession of the Company may be inspected by creditors or contributories in conformity with the order of the Court, but not further or otherwise.

(Notes).

General.

Corresponding English Law.

This section corresponds to S. 221 of the English Companies (Consolidation) Act of 1908.

1.—“*Where an order....supervision of the court.*”**(1) Right of inspection under Ss. 55 and 68 cease on winding-up.**

- (a) The rights given to members, creditors and others by Ss. 55 and 68 to inspect the company's register of members and the register of mortgages come to an end after order has been made for winding-up by or subject to supervision. After a winding-up order a creditor or contributory can inspect the books and papers of the company only in conformity with the order of the Court under this section. *Yorkshire Fibre Co.*, (1870) L.R. 9 Eq. 650; *Kent Coalfields Syndicate*, (1898) 1 Q.B. 754; *Birmingham Banking Co.*, *E. P. Brinsley*, (1866) 36 L.J. (Ch.) 150; *Somerset v. Land Securities Co.*, (1897) W. N. 29. X

N.B.—The books of the company referred to in this section include “the register of mortgages” referred to in S. 68, *supra*. *Somerset v. Land Securities Co.*, (1897) W.N. 29. Y

- (b) The provisions of S. 55, as to the inspection of register of members do not apply even to a company in voluntary liquidation. *Kent Coal Fields*, (1898) 1 Q.B. 754.. Z

(2) Articles of association allowing or disallowing right of inspection, effect of, on winding up.

- (a) Unless the winding-up is for reconstruction, a clause in the articles of association giving or excluding a right of inspection is inoperative in

1.—“Where an order....supervision of the Court”—(Continued).

the winding-up, and the Court may disallow inspection though the articles give a right to inspection or the court may allow inspection though the articles contain a secrecy clause. *Yorkshire Fibre Co.*, 9 Eq. 650; *Birmingham Banking Co., Exp. Brinsley*, 36 L.J. Ch. 150; *Metropolitan and Provincial Bank, Ex. P. Davis*, 16 W.R. 668; *Glamorganshire Banking Co., Morgan's case*, 28 Ch. D. 620. A

- (b) If the winding-up is for the purpose of reconstruction, a secrecy clause in the articles will be regarded, and the court may in its discretion refuse inspection. *Glamorganshire Banking Co., Morgan's case*, 28 Ch. D. 620; *Metropolitan and Provincial Bank, E.P. Davis*, (1868) 16 W.R. 668. B

2.—“The Court may make....thinks just.”

(1) Order for inspection, when will be made.

- (a) An order for inspection will be made only on good cause shown. Before making the order the court must be satisfied from the circumstances that the inspection is required for a proper purpose. *Joint Stock Discount Co., Ex. P. Buchanan*, (1866) 15 W.R. 99; *Imperial Land Co. of Marseilles*, (1882) W.N. 173, *Gooch's case*, 7 Ch. 207. C
- (b) Where the business of one company was transferred to another company without any provision being made for the liquidation of the amalgamated company, and both the companies were subsequently wound up by different branches of the court, an order was made upon the application of the liquidator of the amalgamated company allowing him to inspect the books of his company against the company to which the business was transferred. *National Financial Co.*, 15 W.R. 499. D
- (c) An order for inspection will however be made without any special reasons being assigned for it, where the debts are large and the company's accounts and transactions are complicated, and an accountant may be allowed to attend. *E.P. Buchanan*, 15 W.R. 99=15 L.T. 261; *Imperial Land Co. of Marseilles*, (1882), W.N. 173. E
- (d) But, inspection will always be refused if the applicant requires it not for the purpose of winding-up or for the benefit of those interested in the winding-up, but to enable individual share-holders to establish claims for their personal benefit against the directors or promoters. *North Brazilian Sugar Factories*, 37 Ch. D. 83; *Morgan's case*, (1884) 28 Ch. D. 620; *Re Metropolitan and Provincial Bank, Ex. P. Davis*, (1868) 16 W.R. 668. F

(2) Right to take copies.

- (a) Unless the Court otherwise directs a right of inspection given by an order under this section includes also a right to take copies. *Arauco Co.*, (1899) W.N. 134. See, also, *Nelson v. Anglo-American Agency*, (1897) 1 Ch. 130; *Mutter v. Eastern and Midland Ry. Co.*, 38 C.D. 92.

N.B.—But as S. 55, *supra* expressly provides for copies being furnished by the company, the right of inspection under that section does not include

2.—“ *The Court may make....thinks just* ”—(Continued).

a right to take copies. *Re Balaghat Gold Mining Co.*, (1901) 2 K.B. 666, *overruling Board v. African Consolidated Co.*, (1898) 1 Ch. 596.

- (b) Under an order to inspect and take copies the applicant can take copies himself. He is not required to call upon the liquidator to furnish him with copies and pay a fee for the same. *Arauco*, (1899) W.N. 134.H

(3) Order must relate to books in company's possession.

An order under this section can be made only with reference to books and papers in the possession of the company, and the section does not empower the court to decide any question of right against their parties who possess the books and claim a right of possession. *North Brazilian Sugar Factories*, (1887) 37 Ch. D. 83. I

(4) Liquidator's duty to assist inspection.

It is the duty of the liquidator to give the person who has obtained an order for inspection of books and papers, not only access to them, but every assistance and facility in finding out which are the relevant books and papers required. *Per James, L.J. in Gooch's case*, 7 Ch. 207. J

N.B.—But the liquidator is not obliged at the instance of every person interested in every question arising, to make that fresh and careful investigation which would be necessary to enable him to make the ordinary affidavit which is required from a party called on to make discovery. (*Ibid.*) K

(5) Inspection by one of several liquidators.

One of several liquidators is entitled at his own expense, to inspect the company's books and papers, by an accountant or other duly authorized person. *Gold Overt Syndicate*, (1904) W.N. 73. L

(6) Inspection pending petition.

- (a) Pending petition, the petitioner has only his ordinary rights as shareholder, creditor or litigant, to inspect the register of members, the register of mortgages and other documents. *Credit Co.*, 11 Ch. D. 256. M

- (b) The inspection may also be made by the petitioner's solicitor or agent. (*Ibid.*). See, also, *Beaven v. Webb*, (1901) 2 Ch. 59, 75. N

- (c) Pending petition, the court may order the production of the Company's books for the purpose of cross-examining an officer of the company who has made an affidavit in opposition to the petition. *Emma Silver Mining Co.*, 10 Ch. 194; *Lisbon Steam Tramways Co.*, (1875) W.N. 54; *West Devon Consols*, 27 Ch. Div. 106. O

- (d) But the court will take care not to assist a person who merely files a fishing petition, and then applies to the court for inspection to see what case he can make. (*Ibid.*) P

200-A. (1) In the distribution of the assets of any Company being wound up under this Act, there shall be paid
 Priority of debts. in priority to all other debts—

(a) all revenue, taxes, cesses, and rates, whether payable to Her Majesty or to a local authority ¹, due from the Company at the date of the commencement of the winding-up, and having become due and payable within the twelve months next before that date;

(b) all wages or salary of any clerk or servant ² in respect of services rendered to the Company within the two months next before the commencement of the winding-up, not exceeding one thousand rupees for each clerk or servant; and

all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piece-work, in respect of services rendered to the Company within the two months next before the commencement of the winding-up.

(2) The foregoing debts shall rank equally among themselves, and shall be paid in full, unless the assets of the Company are insufficient to meet them, in which case they shall abate in equal proportions among themselves.

(3) Subject to the retention of such sums as may be necessary for the cost of administration or otherwise, the liquidator or official liquidator shall discharge the foregoing debts forthwith, so far as the assets of the Company are and will be sufficient to meet them, as and when the assets come into the hands of the liquidator or official liquidator.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 209 of the English Companies (Consolidation) Act of 1908. That section reproduces the law as to preferential payments in winding-up as contained in the Preferential Payments in Bankruptcy Act, 1888, the preferential payments in Bankruptcy (Ireland) Act 1889, the Preferential Payment Bankruptcy Amendment Act 1897, the Workman's Compensation Act (1906), S. 5, and the Companies Act 1907.

S. 209 of the English Act runs thus:—

(1) In a winding-up there shall be paid in priority to all other debts—

(a) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve

General—(Continued).

months next before that date, and all assessed taxes, land tax, property or income-tax assessed on the company up to the fifth day of April next before that date, and not exceeding in the whole one year's assessment ;

- (b) all wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding fifty pounds ; and
 - (c) all wages of any workman or labourer not exceeding twenty five pounds, whether payable for time or for piece work, in respect of services rendered to the company during two months before the said date : Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the said date ; and.
 - (d) unless the Company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case one-hundred pounds) due in respect of compensation under the Workman's Compensation Act, 1906, the liability whereof accrued before the said date, subject nevertheless to the provisions of section five of that Act.
- (2) The foregoing debts shall—
- (a) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions ; and
 - (b) In the case of a company registered in England or Ireland, so far as the assets of the Company available for payments of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.
- (3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.
- (4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof :

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

- (5) The date hereinbefore in this section referred to is—
- (a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily the date of the winding-up order ; and
 - (b) in any other case, the date of the commencement of the winding-up.

General—(Continued).

(2) Preferential payments when there is no winding-up—English Law.

- (a) Under the English law where there is no winding-up the debts mentioned in S. 209 of the Consolidation Act have priority if the Company is registered in Scotland or Ireland and either a receiver is appointed on behalf of the debenture-holders or possession is taken by or on behalf of them.
- (b) In such case the debts entitled to preferential payments shall be paid forth-with out of the assets coming into the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.
- (c) In such case the period of time referred to in S. 209 shall be reckoned from the date of the appointment of the receiver or of possession being taken as the case may be.
- (d) Any payments thus made shall be recouped as far as may be out of the assets of the Company available for payment of general creditors. See S. 107 of the English Companies (Consolidation) Act. R

N.B.—As to preferential payments in Companies within the stanneries under the English Act, see section 240 of the Companies (Consolidation) Act of 1908.

(3) Priority of Crown debts.

- (a) In the absence of any express statutory provision, the Crown is entitled by virtue of its prerogative to priority to all other creditors. The Crown is not bound by a statute unless specially mentioned. See *Oriental Bank Corporation* (1895), 28 Ch. D. 643. S
- (b) It is a principle recognized by the laws of many countries that claims of the Crown or State are entitled to precedence, *e. g.*, the Hindu, Roman and French Codes, the laws of Spain, the United States of America, Scotland, and Ireland. 5 B.H.C. (O.C.J.) 23. T
- (c) The Crown was held entitled in respect of arrears of income-tax, to priority of payment over other creditors. *Henley and Co.*, 9 Ch. D. 469=26 W.R. 895; see, also, *West London Commercial Bank*, 36 Ch. D. 364. U
- (d) Also in respect of money deposited at a bank by the Home and Colonial Governments. *Oriental Bank Corporation*, 28 Ch. D. 643. Y
- (e) A judgment debt due to the Secretary of State in Council of India is entitled to the same precedence as a debt due to the Crown, and the reason is that such debt is vested in the Crown, and when realized falls into the State Treasury. 5 B.H.C. (O.C.J.) 23. W

N.B.—The nature of the cause of action under which the judgment-debt was recovered does not affect the right of the Crown or of the Secretary of State in Council for India to priority. (*Ibid.*)

(4) Indebtedness to Crown.

Any one who receives money of the Crown though from a third person becomes immediately a debtor to the Crown. *West London Commercial Bank*, 38 Ch. D. 364. X-Y

(5) Distress by Crown.

In a competition between the Crown and a subject, a distress by the former prevails over a prior distress put in force by the latter but left uncompleted by sale. *Att.-Gen. v. Leonard* (1888), 38 Ch. D. 622. Z

General—(Concluded).

(6) Rights of surety paying Crown debts.

A surety who has paid a Crown debt is entitled to the same priority as the Crown. *Re Churchill (Lord) Manisty v. Churchill* (1888), 39 Ch. D. 174. A

(7) Effect of the section.

The section binds the Crown only with reference to the taxes therein mentioned. The result is that Crown debts not mentioned in the section have priority over all other unsecured debts including the preferred debts mentioned. These preferred debts again have priority over all other unsecured debts (not being Crown debts), but as between themselves, they rank equally. See *Re Oriental Bank Corporation E. P. the Crown* (1884), 28 Ch. D. 643. B

(8) Priority under section does not affect secured debts.

(a) The debts referred to in the section have no preference over secured debts. *Richards v. Kidderminster Overseers* (1896), 2 Ch. 212. C

(b) But under the English law, in the case of a Company registered in England or Ireland, so far as the assets of the Company available for payment of general creditors are insufficient to meet them, the preferential payments referred to in S. 209 of the English Act have priority over the claims of holders of debentures under any floating charge created by the Company, and are to be paid accordingly out of any property comprised in or subject to that charge. S. 209, 2 (b) of the Consolidation Act. D

(9) Distribution of assets after payment of debts.

Subject to the payment of the claims of secured creditors and the preferential payments in this section, the assets are to be distributed among the other creditors *pari passu*. See S. 177 (a), *supra*. E

N.B.—Though S. 177 in terms applies only to a voluntary winding-up, the principle of that section applies equally to all kinds of winding-up. See *Webb v. Whiffin*, L.R. 5 H. 428. F

I.—“All revenue....local authority.”

Local rates—Instances—English Law.

In England, Poor rates and District rates, Water rate and rent for water-meter, have been treated as Local rates. See *Mannesmann Tube Co.*, 1901, 2 Ch. 98. G

2.—“All wages or salary of any clerk or servant.”

(1) Wages or salary paid by commission.

The wages or salary may be fixed or may vary in amount and paid by way of commission. See *Earle's Ship-building Co.*, 1901, W.N. 78; see, also, *Re Klein* 1906, W.N. 148=22 T.L.R. 664. H

(2) Clerks or servants—Instances.

Artists employed to sing by an Opera Company, a ship's mate, a newspaper editor, a commercial traveller have been held to be clerks or servants. See *Re Winter German Opera Limited*, 23 T.L.R. 662; *Ex P. Homberg*, 2 M.D and D. 642; *Ex P. Chipchase*, 7 L.T. 290; *Ex P. Neale, Mout and Mac.*, 194. I

N.B.—Secretary to a Company may be a clerk or servant. But if he does not give his whole time to the Company, and has his duties performed by a clerk appointed and paid by him, he is not a clerk or servant. *Cairney v. Bank*, (1906), 2 K.B. 746. J

2.—“All wages or salary of any clerk or servant”—(Concluded).

(3) Persons who are not servants—Instances.

- (a) A music master, and a drill sergeant giving occasional lessons in a school are not clerks or servants. *Re Heath*, 15 *Ex. P.* 412. **K**
- (b) So also is a managing director of a company not a clerk or servant within the meaning of this clause. *Hopkinson v. Newspaper Proprietary Syndicate Ltd.*, (1900) 2 Ch. 349. **L**

(4) Wages or salary of clerks or servants before Act VI of 1887.

- (a) This section was inserted by Act VI of 1887. Before that Act came into force the claims of clerks or servants of a company in respect of unpaid wages or salary had in general no priority to other debts due by the Company. See 10 B. 211; 2 *Ind. Jur. N. S.* 17. **M**
- (b) But in the winding-up of a Steam Tug Company whose vessels were admitted to be in the habit of going to sea it was held that the captain and the crew were entitled to rank preferentially and to be paid their wages in full in priority to the claims of other creditors, though servants of companies generally had no right to prove in preference to other creditors or to be paid in full in priority to them. 2 *Ind. Jur. N. S.* 17. **N**
- (c) Similarly, labourers employed under Bengal Acts III of 1863 and VI of 1865 were held entitled to their wages in full against a Company which was being wound up, inasmuch as their wages were leviable out of land, and formed a primary charge upon it into whosoever hand it might pass. 2 *Ind. Jur. N. S.* 180. **O**

N.B.—Even purchasers of the land from the Company were held entitled to set off against the purchase-money payments made by them to such labourers on account of wages due to them by the Company previous to the purchase. (*Ibid.*) **P**

201. The liquidator may, with the sanction of the Court where the Company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the Company where the Company is being wound up altogether voluntarily ¹, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidator may deem expedient with creditors or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, whereby the Company may be rendered liable ².

General scheme of liquidation may be sanctioned.

(Notes).

General.

(1) Corresponding English Law.

This section and the next correspond to S. 214 of the English Companies (Consolidation) Act of 1908. Under the English Act in the case of winding up by the Court in England, the liquidator may act with the sanction of the Court or of the committee of inspection, and shall exercise his powers under the section subject to the control of the Court,

General—(Continued).

and any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of any of those powers.

In other respects there is no difference between the English and the Indian Acts. Q

(2) Requisites of compromise under this section and the next.

A compromise under this section or the next section requires the sanction of the Court if the winding up is compulsory or under supervision, and the sanction of an extraordinary resolution where the winding up is voluntary. The assent of a majority of creditors or contributories is not necessary, because a compromise under these sections does not bind any but those who assent to it. Where the winding up is voluntary, the Court may, if necessary, interfere on an application under S. 182. See Buckley, 9th Ed., p. 429. R

(3) Power of compromise when may be exercised.

(a) A power to compromise rights presupposes some dispute about them or difficulties in enforcing them and involves the idea of give and take as between a debtor and creditor. The power cannot be exercised in the absence of any dispute or difficulty. See *Mercantile Investment and General Trust Co. v. International Co., of Mexico* (1891) (1893), 1 Ch. 484 N. C. A.; *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.*, (1894) 1 Ch. 578; *Sneath v. Valley Gold Ltd.*, (1893), 1 Ch. 477, 494, C. A. S

(b) A valid compromise can be made where both parties *bona fide* believe that there is a question in dispute, though it may not be really doubtful. *Lucy's case* (1853), 4 De. G. M. and G. 356 C. A.; and see *Mother Land Consolidated Gold Mines v. Hill*, (1903) 19 T. L. R. 341; *Parry v. Liverpool Malt Co.*, (1900) 1 Q.B. 339, cited in *Halsbury's Laws of England*, Vol. V, p. 604. T

(4) Compromise under the section not binding upon dissenting minority.

This section does not empower the Court to sanction a general compromise so as to bind a dissentient minority. The compromise authorized by this section is one between the company and its creditors who choose to accept it. There is nothing in the section which enables one creditor to bind another creditor to accept a compromise. See *in re Albert Life Assurance Co.*, 6 Ch. 381, 386. U

N.B.—But, under S. 203, *infra*, a statutory majority of creditors can bind a minority to accept a compromise as between a company and its creditors. See Buckley, 9th Ed., p. 492. See, also, *in re Albert Life Assurance Co.*, 6 Ch. 381. Y

(5) Compromise by going companies.

A going company has, as an incident to its existence, the same power of compromising claims against it as an individual has. *Norwich Provident Society, Bath's case*, 8 Ch. D. 334; *Dixon v. Evans* (1872), 5 H.L. 606, 618. W

(6) Liquidator's power to compromise—Extent of.

A Company acting by its official liquidator, with the sanction of the Court, has the same power of compromising with its creditors and its debtors (contributories) as an individual has. Per *James, L.J. in re Albert Life Assurance Co.*, 6 Ch. 381, 386. X

General—(Continued).

(7) Court must be satisfied as to the propriety of compromise.

In granting sanction to a compromise the Court is exercising a judicial discretion, and unless its previous knowledge of the winding up is sufficient, will not sanction a compromise without having means of judging as to the propriety of the compromise. *North Cumberland and Durham District Banking Co., E.P. Totty*, 1 Dr. and S.M. 273 = 6 Jur. (N.S.), 849; *Oriental Bank Corp.* (No. 2), 56 L.T. 868. Y

(8) Sanction obtained by misrepresentation.

The Court of the Judge in Chambers has jurisdiction to rescind a sanction for a compromise, given under a misrepresentation. *Re Leeds Banking Co., Ex. P. Clarke* (1866), 14 W.R. 856. Z

(9) Compromise obtained by non-disclosure of material facts.

(a) Likewise the Court may, in a winding up, refuse to treat as binding, a compromise assented to by the company under a non-disclosure of material facts. See *Re Darjeeling Tea Co.*, 1866, W.N. 361. A

(b) Thus, where a director had not disclosed his interest as vendor of a property bought by the company, and the company afterwards compromised the claim for the purchase money for a smaller amount, the Court refused in the winding up, to treat the compromise as binding, the validity of the contract not having been brought before the shareholders in compromising. *Re central Darjeeling Tea Co.*, 1866, W.N. 361, cited in *Manson's Law of Trading Companies*, p. 825. B

(10) Compromise against the will of liquidator.

(a) The Court has no jurisdiction to compel a liquidator to consent to a compromise with a creditor or a contributory. The consent of both the Court and the liquidator is necessary for a compromise. *Hankey's case*, 26 L.T. 358; *Pearson's case*, 7 Ch. 309. C

(b) But under the English Law, as by S. 214 (2) of the Consolidation Act, the power to compromise in a compulsory winding up in England is subject to the supervision of the Court; it may be, the Court can order the liquidator to compromise. See *Emden's Winding-up of Companies*, 8th Ed., p. 237. D

(11) Winding-up under supervision—Liquidator whether competent to compromise without Court's sanction.

(a) S. 195, *supra*, empowers a liquidator under supervision to exercise, subject to any restriction imposed by the Court, all his powers without the sanction of the Court as if the company were being wound up altogether voluntarily. But it is not easy to say how far liquidators in a winding-up under supervision may, by virtue of that section, compromise without the sanction of the Court. See *Buckley*, 9th Ed., p. 492. E

(b) But in *Wright's case* (1870) 5 C.H. App. 470, 477, *Giffard, L.J.*, held that unless the Court had otherwise directed, the liquidator of a company that was being wound up subject to supervision might make a compromise without obtaining the sanction of the Court. F

(c) *Emden* says:—"James v. May, L.R. 6 H.L. 328, does not conflict with *Wright's case*, 5 Ch. 437; Lord Chelmsford's dictum was that the

General—(Continued).

directors could not compromise after winding-up under supervision without the sanction of the Court." See *Emdens Winding-up of Companies*, 8th Ed., p. 236. G

N.B.—Whether or not he has power to make a compromise without the sanction, he may, for his own protection, apply for the sanction of the Court; a liquidator of a company in voluntarily winding-up can make a like application under S. 182, *supra*. See *Sinde Punjab and Corporation*, 15 L.T. 602=(1867) W.N. 41. H

(12) **Compromise in voluntary winding up—Court's sanction, when necessary.**

If, in a voluntary winding-up, an application is made to the Court under S. 182, *supra*, in respect of a claim, the Court has *seisin* of the matter, and the liquidator cannot compromise without the sanction of the Court. *Lama Coal Co., E.P. Miller*, 2 Ch. 692. I

(13) **Compromise by voluntary liquidator without sanction of meeting—Validity of.**

A compromise with a creditor made by the liquidator of a company in voluntary winding up without the sanction of an extraordinary resolution is, unless proper steps are taken to set it aside, binding on the company. See *Cycle Makers Co-operative Supply Co.*, (1903), 1 K.B. 477. J

(14) **Arrangement under section does not bind foreign creditors without jurisdiction.**

(a) The Act does not apply to Colonies or to foreign countries and a scheme under the Act cannot be set up as a defence to an action by a non-assenting creditor brought in a foreign or colonial Court on a debt arising in the colony or foreign country. See *New Zealand Loan Co. v. Morrison*, (1898) A.C. 349; also *Gibbs and Sons v. Societe Industrielle et Commerciale des Metaux*, (1890), 25 Q.B.D. 399 C. A. K

(b) "To render the scheme effectual it must be rendered binding according to the law of the foreign place in which the assets are." *Buckley*, 9th Ed., p. 273. L

(c) The difficulty can be met by obtaining the sanction of the foreign or colonial Court as well as of the Indian Court. M

(d) In *Dane v. Mortgage Insurance Corporation Ltd.*, (1894) 1 Q.B. 54, 57, C. A. a scheme was sanctioned by the Colonial as well as the English Court in order to bind the company's assets in both jurisdictions. N

(15) **Compromise with a class.**

A compromise under this section may be sanctioned not only with individual creditors but also with creditors as a class notwithstanding differences of position among them. See *Bank of Hindustan, China and Japan v. Eastern Financial Association*, L.R. 2 P.C. 490; *Commercial Bank Corporation of India* and the East, 8 Eq. 241. O

(16) **Class of creditors—What constitutes.**

(a) It is very difficult to say what constitutes a class of creditors.

The creditors composing different classes must have different interests. When you find a different state of facts existing among different creditors which may differently affect their minds and their judgment they must be divided into different classes. Per *Lord Esher, M. R. Sovereign Life Ass. Co. v. Dodd*, 1892, 2 Q.B. 580, cited in *Buckley*, 9th Ed., p. 273. P

General—(Concluded).

- (b) "Class" must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. Per *Bomen, L.J. Sovereign Life Ass. Co. v. Dodd*, (1892), 2 Q.B. 583. Q
- (c) In an insurance company the holders of matured policies, and the holders of unmatured policies belong to different classes. *Sovereign Life Assurance Co. v. Dodd*, (1892), 2 Q.B. 573. R
- (d) Holders of debentures of the same series constitute a class. See Buckley, 9th Ed., p. 273. S
- (e) Creditors who are also share-holders belong to the same class as creditors who are not share-holders. See *Madras Irrigation Co. W. N.* (1881), 172. T
- (f) Where an arrangement under this Act has not the effect of binding foreign or colonial creditors, as regards assets not within the jurisdiction, they must be considered as forming a separate class. See Buckley, 9th Ed., p. 274. U
- (g) "As regards assets out of the jurisdiction it is not easy to see how the Court can deal with them unless it be by imposing upon them a principle of hotchpot. In many cases, however, this would be impossible." Buckley, 9th Ed., p. 274. Y
- (h) If a company has borrowed largely from many people, it is not easy to say whether all the mortgagees form a class, and whether a statutory majority can vote away the security of the minority. See Buckley, 9th Ed., pp. 273, 274. W
- (i) Similarly, if a company which has business in many towns keeps a banking account in each and gives every banker a security for over-draft by deposit of deeds, it is doubtful whether all the bankers form a class. Buckley, 9th Ed., p. 274. X

(17) Rights against sureties for company's debts need not be reserved.

It is not necessary that a scheme should expressly reserve the rights of any creditors against sureties for debts of the company for such rights remain unaffected by the scheme. *London Chartered Bank of Australia* (1893), 3 Ch. 540, 546; *Dane v. Mortgage Insurance Corporation* (1894), 1 Q.B. 54 C.; *Finlay v. Mexican Investment Corporation* (1897), 1 Q.B. 517. Y

(18) Stay of action and discharge of contributories from further liabilities need not be expressly reserved.

Nor is it necessary that the order sanctioning the scheme should contain, at all events in a winding up by or subject to supervision of Court, express words staying proceedings by creditors, or discharging contributories from further liability than that imposed by the scheme. *London Chartered Bank of Australia* (1893), 3 Ch. 540. Z

(19) Interpretation of terms used in a scheme.

Expressions used in a scheme sanctioned under this section ought to have attributed to them their ordinary commercial meanings in the absence of any countervailing context. Thus, the word discount as used in a scheme means rebate of interest, not true or mathematical discount. *Land Securities Co., E. P. Farquhar* (1896), 2 Ch. 320. A

202. The liquidator may, with the sanction of the Court where the Company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the Company where the Company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, subsisting or supposed to subsist between the Company and any contributory or alleged contributory, or other debtor or persons apprehending liability to the Company, and all questions in any way relating to or affecting the assets of the Company, or the winding-up of the Company, generally upon such terms as may be agreed upon, with power for the liquidator to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities.

(Notes).

General.

(1) Compromise under section does not bind dissentient minority.

The Court has no jurisdiction under this section to sanction a general compromise so as to bind a dissenting minority of share-holders. The compromise authorized by the section is one between the company and its debtors (contributories) which choose to accept it. *In re Albert Life Assurance Co.*, 6 Ch. 381, 386. **B**

(2) Compromise with class.

A compromise under the section may be made with share-holders generally or classes of them, as well as with individual share-holders. *Bank of Hindustan, China and Japan v. Eastern Financial Association*, L.R. 2 P.C. 490; see, also, *Commercial Bank Corporation of India* and the East, 8 Eq. 241. **C**

(3) Compromise before settling list of contributories.

The words which are to be found in this section, especially the words "liabilities to calls, debts and liabilities capable of resulting in debt, subsisting or supposed to subsist" and the words "alleged contributory" plainly show that the Court has power to sanction compromises of calls, debts, liabilities, before the list of contributories has been settled, or the competence of share-holders has been ascertained. 3 B.L.R. 8 (P.C.) = 12 W.R. 27 = 13 M.I.A. 15. **D**

N.B.—The words of the section are very wide and general. It may be conjectured that the great amount of costs and expenses incurred in the winding-up of Companies induced the Legislature to increase the powers of the Court with respect to compromises in order to the diminishing of those costs. 13 M.I.A. 15. **E**

(4) Forfeiture of shares under power to compromise.

(a) A power to make a compromise does not include a power to forfeit the shares *bona fide* held by a member. *Spackman v. Evans*, L. R. 3 H. L. 171. **F**

General—(Concluded).

- (b) But where there is a *bona fide* dispute as to whether a person is a member or not, a compromise involving the cancellation of the shares of that member, is valid, though there is no express power to compromise. *Lord Belhaven's case*, 3 De. G. J. and S. 41; *Dixon v. Evans*, L.R. 5 H. L. at p. 618, *Bath's case*, 8 C.D. 334. **G**
- (5) **Past members not discharged by compromise with present member.**
A past member is not discharged from liability as a B contributory by a compromise made by the liquidator with an A contributory. *Nevill's case*, 6 Ch. 43, *Hudson's case*, 12 Eq. 1, *Helbert v. Banner*, L.R. 5 H.L. 28. **H**
- N.B.**—The relation of a present member to a past member is not that of a principal debtor to a surety. Their relation is one of a primary and secondary liability. *Helbert v. Banner*, L.R. 5 H.L. 28, *Roberts v. Crow*, L.R. 7 C.P. 629. **I**
- (6) **Compromise with contributories may be sanctioned though opposed by creditors.**
(a) The Court may sanction a compromise entered into by the liquidator with a contributory, though it is opposed by some of the creditors. A compromise duly sanctioned is binding on all parties. See *Smith Knight and Co.*, 16 W.R. 1104; *Paraguassu Tramways*, 28 L.T. 463; *E. P. Morton*, 38 L.J. Ch. 390. **J**
(b) Thus, in spite of the dissent of some creditors the Court sanctioned an arrangement under which calls due from contributories were made payable in instalments, and large discounts were allowed to contributories who paid the instalments before they became due. *Smith Knight and Co.*, 16 W.R. 1104=37 L.J. Ch. 364. **K**
- (7) **Compromise of claim against director—Stay of action—Jurisdiction.**
Where a majority of contributories made a compromise of certain claims against the late directors of the company, and the compromise was assented to by the Court, it was *held*, the Court had no jurisdiction to stay actions against the directors, commenced by two of the dissentients. *New Zealand Banking Corporation, E. P. Hankey*, 21 L.T. 481=1869 W.N. 226. **L**
- N.B.**—S. 136, *supra*, confers no jurisdiction to stay actions against directors. (*Ibid.*) **M**
- (8) **Appeal against order granting sanction.**
Where it appeared that proceedings for a compromise by liquidators were not tainted with fraud, and where all the facts of the case were placed before the Courts in India, the Privy Council declined to interfere with the discretion of the High Court in sanctioning the compromise. 3 B.L.R. (P.C.)=12 W.R. 27=13 M.I.A. 15. **N**

203. Where any compromise or arrangement shall be proposed between a Company which is, at the commencement of this Act or afterwards, in the course of being wound up either voluntarily or by or under the supervision of the Court, and the creditors of such Company, or any class of such creditors¹, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way

¹ Where compromise proposed, Court may order a meeting of creditors, etc., to decide as to such compromise.

of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct²; and, if a majority in number, representing three-fourths in value, of such creditors or class of creditors present either in person or by proxy at such meeting shall agree to any arrangement or compromise³, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said Company.

(Notes).

General.

(1) **Corresponding English Law.**

This section corresponds to S. 120 of the English Companies (Consolidation) Act of 1908. But the scope of that section is much wider than that of the present section. It applies to compromises between a company (whether a going concern or one in the course of being wound up) and its creditors or members. The company must, however, be one that is capable of being wound up under that Act. O

(2) **Arrangement under section, when desirable.**

As a forced sale of the assets of a company is very often ruinous to both creditors and contributories, the power conferred by this section to a majority of creditors to bind a minority to an arrangement will be found most beneficial for avoiding the necessity of a forced sale. Such arrangements may take the form of binding creditors or members to accept a composition or to accept shares on a reconstruction otherwise than in accordance with their rights, or of selling the assets to some one who will pay them a composition, the winding-up of the Company being continued in each case, or binding creditors to accept from the company the payment of their debts, debentures or shares in the company which constitutes its business. Sometimes the arrangement provides for floating a new company, and for the creditors to take preference shares or debentures, and the share-holders to take deferred shares, and then for the new company to carry on the old business. *Emden's Winding-up of Companies*, 8th Ed., pp. 330, 331. P

(N.B.)—This section may be said to be an enlargement of S. 201. See *English Scottish, etc., Bank*, 1893, 3 Ch. 385, 393.

I.—“Where any compromise.... of such creditors.”

(1) **Scheme under section binds minority of dissentients.**

Though a scheme under the section may be dissented from by some of the creditors, still, if it is approved by the requisite majority of creditors and is duly sanctioned by the Court it is binding on all the parties including the dissentient minority. See *In re Albert Life Assurance Co.*, 6 Ch. 381. Q

(2) **Re-construction under the section.**

(a) This section may be resorted to to effect a scheme of re-construction. A re-construction under this section, though it requires the sanction of the Court has some advantages which a re-construction under

1.—“Where any compromise... of such creditors”—(Continued).

S. 204 has not got. One advantage is that a scheme assented to by a majority of a class of creditors, and sanctioned by the Court binds the minority, e.g., a scheme under which debenture holders should receive shares in satisfaction of their debts. See Evans and Cooper, p. 162 ; c.f. *Slater v. Durlaston Co.*, (1877), W.N. 165. **R**

- (b) But before sanctioning a scheme of re-construction under this section, the Court may require that dissentients should be given such rights as they would have had if the re-construction had been under S. 204, unless having regard to the value of the assets it is clear that the dissentients had really no interest. *Canning, Jarrah Timber Co.*, (1900), 1 Ch. 708 ; *Re Tea Corp.* (1904), 1 Ch. 12. **S**

(3) Creditor, meaning of.

- (a) Any person having a pecuniary claim against a Company whether actual or contingent is a creditor within the Act. *Midland Coal Co., Craig's claim*, (1895), 1 Ch. 267. **T**
- (b) The word “creditor” in the section being general applies to all classes of creditors, and no distinction is made between different kinds of creditors, so as to exempt any particular class from the jurisdiction of the Court. *Re Empire Mining Co.*, (1890), 44 Ch. D. 402, 409. See, also, *Alabama, etc., Ry. Co.*, (1891), 1 Ch. 213. **U**
- (c) Thus, a lessee who has assigned the lease to a Company and has taken the Company's covenant to indemnify him against the liabilities in the lease is a creditor and is bound by a scheme duly sanctioned under the section. *Midland Coal Co., Craig's claim* (1895), 1 Ch. 267. **V**
- (d) So also are debenture holders and foreign and colonial creditors when their rights are in question in this country. *Alabama, etc., Ry. Co.*, (1891) 1 Ch. 213; *Dymevor, etc., Collieries Co.*, 11 Ch. D. 605; *Empire Mining Co.*, 44 Ch. D. 402 ; *Slater v. Durlaston Steel Co.*, 1877, W.N. 139 ; *Madras Irrigation Company, Chitty, J.*, March 1882—*New Zealand Loan Co. v. Morrison*, (1898), A.C. 349, 357. **W**

(4) Compromise by different classes of creditors *inter se*.

Under the Act different classes of creditors may compromise with one another, as well as with the company. See *Per Chitty, J.*, in *Dominion Canada Freehold Estate and Timber Co.*, 55 L.T. 347, 351. **X**

(5) Schemes under the section—Instances.

- (a) The Court may sanction a scheme under which assets are to be sold to a new Company and debenture holders and other creditors are to be allotted shares in the new Company in satisfaction of their debts. See *Slater v. Durlaston Steel Co.*, 1877 W.N. 165; *Re Empire Mining Co.*, 44 Ch. D. 402 ; *Re Alabama Ry. Co.*, (1891), 1 Ch. 213. **Y**
- (b) Also a scheme under which fresh capital is to be raised by debentures, with priority over the existing debentures. *Western of Canada Oil Co.*, W.N. 1874, 148 ; see, also, *Wedgwood Coal Co.*, 6 Ch. D. 627; *Dominion of Canada Freehold Estate Co.*, 55 L.T. 347. **Z**
- (c) Or a scheme under which the Company is empowered to borrow money giving the lenders a rent charge which shall have priority over the debentures. *Dominion of Canada Co.*, 55 L.T. 347, 351. **A**

1.—“Where any compromise....of such creditors”—(Concluded).

- (d) A scheme under which property of the Company subject to security for payment of debts is with the consent of the majority of secured creditors leased at a dead rent. *Dynevor Collieries Co.*, 1 Ch. Div. 605. **B**
- (e) A scheme under which debenture holders are to give up their security upon payment of less than the amount due to them. *Madras Irrigation Co.*, (*Chitty*, J) March, 1892. **C**
- (f) A scheme under which debentures, the interest on which is to be only payable out of the profits of the Company, are to be exchanged for debentures the interest on which is payable whether profits are made or not. *Alabama, &c., Ry. Co.*, (1891), 1 Ch. 213. **D**
- (g) In *Bessemer Steel Co.*, 1 Ch. D. 251 a scheme was sanctioned under which one creditor was to take all the assets of the company and to pay the other creditors a composition at the rate of 5s 3d in the pound. **E**

(6) Separate meetings for different classes.

Where the scheme affects different classes of creditors, it is necessary that there should a separate meeting for each class. *Re Wedgwood Coal and Iron Co.*, (1877), 6 Ch. D. 627; *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* (1891), 1 Ch. 213 C.A.; *Sovereign Life Assurance Co. v. Dodd*, (1892), 2 Q.B. 573. **F**

N.B.—But creditors who are also share-holders belong to the same class as creditors who are not share-holders, and in the absence of any improper motive are entitled to vote along with them. *Madras Irrigation Co.*, W.N. (1881) 172. **G**

(7) Creditors whose interests are not affected need not be summoned.

Where there are several classes of creditors, and the scheme or arrangement affects the right of some particular class or classes only, it is not necessary to send notice of the meeting to the members of that class whose rights are not affected. *Re Tea Corporation Ltd.*, *Sorbic v. Sama and Co.*, (1904) 1 Ch. 12 C.A. **H**

N.B.—Where there are matured and unmatured policy-holders of an Insurance Co., a dissentient holder of a matured policy is not bound by a resolution passed at a meeting to which all the policy-holders are summoned. *Sovereign Life Assurance Co.*, *Dodd*, (1892), 2 Q. B. 573. **I**

(8) Dissent of a class having no interest, may be disregarded.

The Court may, in disregard of the dissent of one class of persons, sanction a scheme of arrangement if it is of opinion that that class has no interest in the assets and their assent of that class at the meeting is unnecessary. See *Re Tea Corporation, Ltd.*, (1904), 1 Ch. 12. **J**

2.—“To order....shall direct.”

(1) Scheme to be passed at one meeting.

Where some creditors reside outside jurisdiction, subsidiary meetings for purposes of discussion and mutual information may be directed to be held out of the jurisdiction. But, it is conceived there can be only one meeting of the class and at that meeting the action of the absentees must be by proxy. See *English Scottish, &c., Bank*, 1893, 3 Ch. 885, 389, 392 and *Buckley*, 9th Ed., pp. 275 and 276. **K**

2.—“To order....shall direct”—(Continued).

(2) Meetings—Adequate representation of.

There must be adequate representation, entire body of creditors, or class of creditors in the meeting. *Re Alabama Ry. Co.*, (1891), 1 Ch. 218, 245. **L**

(3) Notice of meeting to holders of debentures payable to bearer or registered holder.

In the case of holders of debentures payable to “bearer or registered holder,” notice by advertisement together with notice by circular to all debenture-sholders whose names are known, is a good notice. *Mexi Investment v. International Co. of Mexico*. (1891) (1893), 1 Ch. 484 N, 488 N. **M**

(4) Notice by advertisement—Date of notice.

Where notice is given by advertisement the date on which the advertisement is published shall be taken to be the date of notice. *Mexi Investment v. International Co. of Mexico* (1893), 1 Ch. 484 N, 489 N. **N**

(5) Court's control over the proceedings of the meeting.

This section while providing that the meeting shall be summoned in such manner as the Court directs, contains nothing to give the Court control over the proceedings of the meeting. The gap, however, is filled by the words of Ss. 140 and 193, *supra*, “held and conducted in such manner as the Court directs;” and even without this, *semble*—the Court would have an inherent power to give directions on the subject. *English, Scottish, etc., Bank*, (1893) 3 Ch. 385, 395, 410, 417. See, also, *Buckley*, 9th^{ed.}, p. 276. **O**

(6) Majority—How determined.

The majority required by this section is a majority representing three fourths in value of the creditors present either in person or by proxy, and not a majority representing three fourths in value of the total amount of debt. The votes of creditors who are not present are left out of account. Again as the majority required is the majority of the creditors present, and not a majority of those who are present and vote, the chairman has only to ascertain how many are present and how many vote for the resolution. The result would be that those who do not vote at all increase the numbers of those who vote against the resolution. See *Bessemer Steel and Ordnance Co.*, 1 Ch. D. 251; *Alabama, etc., Ry. Co.* (1891), 1 Ch. 218. *Buckley*, 9th Ed., p. 274. **P**

(7) Debenture holders—Votes of.

(a) Holders of debentures which pass by delivery are not entitled to vote unless they produce their debentures at or before the meeting. *Wedgwood Coal and Iron Co.*, (1877), 6 Ch. D. 627. **Q**

(b) Where the debentures are registered, only the registered holder or his proxy can vote. *Halsbury's Laws of England*, Vol. V, p. 606. **R**

(8) Voting by Proxy.

(a) The right of a share-holder to vote by proxy depends on the contract between himself and his co-share-holders, and where the parties have a right depending upon the contract between them and other parties, there, all the requisitions of the contract as to the exercise of that right must be followed. 27 B. 113 (119) following *Harben v. Phillips*, (1883), 23 Ch. D. 14. **S**

2.—“To order....shall direct”—(Concluded).

- (b) But where an article of association of a Company provided that no person should be appointed or have authority to act as a proxy who was not a share-holder in the Company, it was held by the Privy Council reversing the decision in 27 B. 113 that on the true construction of the article it was not necessary that the person appointed to be a proxy should be a share-holder when the power-of-attorney was signed, that the article was complied with if the qualification was acquired at the time when he was called upon to act as proxy. 29 B. 126. T
- (c) It is not necessary that the actual name of the person appointed as proxy must appear in the proxy paper: it would suffice if he were designated by a descriptive, which would fix his identity at the date of the appointment. 27 B. 113. See, also, 29 B. 126. U

(9) Proxy—To whom can be given.

- (a) A proxy can be held only by a person who is a member of the class of which the meeting is summoned. *Madras Irrigation Co.*, (1881), W.N. 120. Y
- (b) Where the bulk of creditors of a bank that was being wound up in England were abroad, the Court ordered that creditors abroad might execute proxies to designated persons to vote for or against the scheme, and deposit them at some named place aboard at least three days before the meeting and that the particulars of the proxy should be telegraphed to London and that the proxies thus communicated should be received as votes at the meeting, although the proxy papers were not and could not be there produced. *English, Scottish, etc., Bank*, (1893), 3 Ch. 385. W

N.B.—A proxy paper is not invalid by reason of the fact that it authorizes the agent to vote “for” a particular scheme, with a marginal note, to substitute the word “against” for the word “for” if so advised. See *English, Scottish and Australian Bank*, (1893), 3 Ch. 385. X

4.—“Such arrangement....said Company.”

(1) Court's sanction to a compromise, when will be given.

- (a) In exercising its power of sanctioning a scheme the Court will consider whether all the statutory conditions have been complied with, whether the class of creditors summoned to the meeting was fairly represented by those who attended, and whether the statutory majority who approved, were acting *bona fide*, or were seeking to promote interests adverse to those of the class whom they preferred to represent, and generally whether the arrangement is such as a man of business would reasonably approve. *Alabama, etc., Ry. Co.*, (1891) 1 Ch. 213; *Wedgwood Coal Co.*, 6 Ch. D. 627; *English, Scottish, etc., Bank*, (1893) 3 Ch. 385; *Buenos Ayres Water Co.*, 66 L.T. 408; see, also, 12 Bom. L.R. 525=7 Ind. Cas. 452. Y
- (b) The Court should also see that the compromise is honestly intended for the benefit of the company. *Yates v. Cyclist's Touring Club*, (1898), 24 T.L.R. 581. Z
- (c) The Court will not sanction a scheme if it finds that the required majority have not acted *bona fide* in the interests of the class of creditors whom they represent but have voted in their own individual interests. *Wedgwood Coal, Co.*, 6 Ch. D. 627. A

3.—“Such arrangement....said Company”—(Continued).

- (d) But though the *bona fides* of the majority of creditors is not the only question which the Court is required to see before according sanction, still, it would be slow to differ from the meeting unless either the creditors have not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind or some blot is found in the scheme. See *English, Scottish, etc., Bank*, (1893) 3 Ch. 385, 398, 409; *London Chartered Bank of Australia*, (1893) 3 Ch. 540, 545. **B**
- (e) Where the majority have not acted *bona fide*, the Court may order the petition to stand over with liberty to apply for a fresh meeting to be summoned. *Wedgwood Coal Co.*, 6 Ch. D. 627. **C**
- (f) Where the classes were : (1) first debenture holders, (2) second debenture holders, and (3) unsecured creditors, a state of complicated interest arising from the fact that some of the majority of class (1) held second debentures and held shares and might therefore look at the scheme not in the interest of class (1), but in that of class (2) or (3) or of the share-holders, did not prevent them from voting, but would induce the Court to look with caution and care at the effect of what was done at the meeting. *Alabama Co.*, (1891), 1 Ch. 213, 239, 244, cited in *Buckley*, 9th Ed., p. 275. **D**
- (2) Schemes which may not be sanctioned—Instances.
- (a) The Court may refuse sanction to a scheme which involves the delegation to the majority of the power of the Court, e.g., a scheme under which debentures were to be secured by a trust deed giving a majority to make compromises so as to bind the minority. *Land Mortgage Bank of Florida*, (1896) W.N. 48. **E**
- (b) Where a scheme proposes that the company is in difficulties and that it is to make over its assets to a new company the Court may refuse its sanction unless the scheme provides that the new company should undertake to obey the order of the Court as to any proceedings which the Court might think it right to have taken against the officers of the old company. Practice Note (1894), W.N., p. 166. **F**
- (c) The Court will also refuse to sanction a scheme under which debentures were to be secured by a trust-deed empowering the majority to make compromises binding on the minority. *Land Mortgage Bank of Florida*, (1896), W.N. 48. **G**
- (d) The Court may refuse to sanction a scheme involving payment of costs or remuneration without any provision for taxation or allowance by the Court. *Mortgage Insurance Corporation*, (1896), W.N. 4. **H**
- (e) But such an undertaking would not be required where the company is perfectly solvent and what is being done is a mere operation of selling to a new company. (*Ibid.*) Practice Note, (1894), W.N. p. 166. **I**
- (f) The Court should not, as a general rule, sanction an arrangement if it would prejudice a creditor whose rights would have been preferential if the winding up petition had been carried on; e.g., a judgment-creditor who would have got leave in the winding up to issue execution. Per *Fry, J.*, in *Richards & Co.*, (1879), 11 Ch. D. 676, 679. **I-1**
- (g) Nor will sanction be readily granted when the scheme involves under-writing shares out of the company's assets, or where a scheme of re-construction does not secure to dissentients rights similar to those given to dissentients under S. 204. See *Canning Jarrah Co.*, (1900), 1 Ch. 708. **I-2**

3.—“Such arrangement....said Company ”—(Continued).

(3) Debts must be capable of estimation.

- (a) Before sanctioning a scheme under this section the Court must see that there is a majority of creditors sufficient to bind the minority, and for this purpose it must be satisfied that there is a meeting of creditors the amount of whose debts can be estimated, and that three fourths of the creditors have assented. The section cannot be applied if the claims or individual creditors cannot be estimated. See *Re Albert Life Assurance Co.*, 6 Ch. App. 381. J
- (b) Thus the Court refused to sanction an arrangement between a number of life assurance companies where the data were not sufficient to enable it to ascertain the value of the policy-holder's claims. *In re Albert Life Assurance Co.*, 6 Ch. 381. K

(4) Arrangement not vitiated by technical defects.

- (a) If the arrangement is an honest and fair one, the Court will not be astute to find out any technical defects in the proceedings. *Dynevor Collieries Co.*, per James, L.J., 11 Ch. D. 604. L
- (b) Thus, if a scheme has obtained the sanction of the requisite majority of creditors and contributories under the section, and also sanction of the Court, it is not material in what order the sanctions were given. *Dynevor Collieries Co.*, 11 Ch. D. 665. M

(5) Court may impose conditions or make alterations.

- (a) Before giving its sanction to a scheme the Court may impose conditions or require that the scheme should be modified. See *Canning Jarrah Timber Co.*, (1900) 1 Ch. 708. N
- (b) Thus, where a scheme involves a re-construction by sale and transfer of the assets of a company to another company, the Court may, before giving its sanction, require that the dissentient share-holders shall be given the option which they would have under S. 204, *infra*. *Canning Jarrah Timber Co.*, (1900) 1 Ch. 708. O
- (c) Where a scheme involves the transfer of business to a new company and the share-holders of the old company take shares not fully paid up in the new company in respect of shares as to which they are liable in the winding up, the Court may, as a condition of sanctioning the scheme, require that the memorandum or association of the new company shall contain a clause preventing them from escaping liability by transferring their new shares. See Buckley, 9th Ed., p. 277; *Emden's Winding up of Companies*, 8th Ed., p. 333. P

(6) Scheme involving reduction of capital.

A scheme involving a reduction of capital must comply with the provisions of the Act relating to reduction. Cooper, Cooper and Johnson, (1902), W. N. 199. Q

(7) Effect of scheme sanctioned under the section.

A scheme sanctioned by the Court under this section is an alternative mode of liquidation, and by operation of law is effective to relieve the company and its contributories from further liability than that imposed by the scheme, their discharge being effected by the stay of action under S. 136, or order to stay action under S. 182 coupled with a stay of winding up proceedings. *London Chartered Bank of Australia* (1893), 3 Ch. 540, 546. See, also, *Dane v. Mortgage Ins. Corp.* (1894), 1 Q.B. 54; *C. F. Re Jacobs*, 10 Ch. 211; *Finlay v. Mexican Investment Corp.* (1897) 1 Q.B. 517. R

3.—“Such arrangement....said company”—(Concluded).

(8) Appearance at the hearing of petition.

Creditors or share-holders who desire to oppose the scheme must appear during the hearing of the petition. *Securities Insurance Co.*, (1894) 2 Ch. 410. S-U

(9) Leave to appeal against order granting sanction.

Persons who have not opposed the scheme at the meeting, or appeared at the hearing of a petition under this section cannot appeal without leave from the order sanctioning the scheme. *Securities Insurance Co.*, (1894) 2 Ch. 410. Y

(10) Costs of appearing on the petition.

(a) The Court may, in the exercise of its discretion, disallow the costs of creditors appearing on the petition, if it is of opinion that they might have left the matter to the liquidators. See *Re Albert Life Assurance Co.*, 40 L.J. Ch. 509=6 Ch. 381. W

(b) In *Tunis Railways Co.*, 31 L.T. 264, a dissentient minority of debenture holders were disallowed costs out of the estate. X

(10) Liquidators not be compelled to make a compromise.

(a) Notwithstanding this section, the Court has no jurisdiction to compel the liquidator to consent to a compromise with a creditor. *International Contract Co.*, Hankey's case, 26 L.T. 359=(1872) W.N. 63. Y

(b) But Buckley says that “though from the introductory words of the section when a compromise or arrangement shall be proposed, it might be said that there could be no proposition unless the liquidator were a party to it; it must not be overlooked that the application to the Court may be made by a creditor, and that, if sanctioned, the arrangement is to be binding on the liquidator.” Buckley, p. 277. Z

(11) Compromise duly sanctioned binds all parties.

A scheme once sanctioned, whether valid or not, is binding upon all concerned creditors, liquidators and share-holders. The only remedy is to appeal. *Nicholl v. Eberhardt Co.*, (1889) 61 L.T. 489 C.A., 1 Megone 402. A

N.B.—The sanction of the contributories is not required to a compromise between the company and its creditors.

Miscellaneous.

Clause in debenture for compromise on modification of rights of debenture holders.

(a) Debenture deeds often contain a clause providing for calling meetings of the debenture holders and enabling a specified majority to bind the whole body of holders to a modification, compromise or release, of their rights against the company or the security. As to such clauses, *Follitt v. Eddystone Granite Quarries*, (1892), 3 Ch. 75; *Sneath v. Valley Gold, Ltd.*, (1893), 1 Ch. 477; *Mercantile Investment, etc.*, Co., v. *River Plate, etc.*, Co., (1894), 1 Ch. 578. B

(b) But a power to modify or compromise rights does not include a right to extinguish or relinquish the rights against the company unless there is some difficulty or dispute in enforcing those rights. *Mercantile Investment and General Trust Co. v. International Co. of Mexico*, (1891), cited (1893) 1 Ch. 484 N.; *Sneath v. Valley Gold*, (1893), 1 Ch.

Miscellaneous—(Concluded).

477; *Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co.*, (1894) 1 Ch. 578. See, also, Buckley, 9th Ed., p. 278. C

- (c) Thus, the majority of debenture holders cannot bind the minority by a resolution that the debenture holders should accept shares in a new company in exchange for the debentures; for, this would be an extinction of all their rights against the old company and its property. D
(*Ibid.*)

N.B.—But, though such a scheme is not a “modification or compromise” of the rights of debenture holders, it may be an “arrangement” within the meaning of this section. See Buckley, 9th Ed., p. 278.

- (d) “A power to modify or comprise” rights enable the majority to give a mortgage priority having over the debentures. *Follit v. Eddystone Quarries*, (1892), 3 Ch. 75; Compare *Dominion of Canada Freehold Estate and Timber Co.*, (1886), 55 L.T. 347; *Frinlay v. Mexican Investment Corp.*, (1897), 1 Q.B. 517, where payment was postponed. E

- (e) A scheme for increasing the amount of debenture stock and extending the date for redemption where the company is unable to redeem at the due date, may be a “compromise or adjustment” of claims. *Walker v. Elmore's Co.*, 85 L.T. 767. See Buckley, 9th Ed., p. 278. F

- (f) But a mere power enabling the majority to bind all the debenture holders as if they had consented does not enable the majority to bind the whole body to an arrangement inconsistent with the debenture deed. *Hey v. Swedish and Norwegian Rail Co.*, (1889), 5 T.L.R. 460, C.A. = (1889), W.N. 95. G-Z

204. Where any Company is proposed to be, or is in the course

Power for liquidators to accept shares, etc., as a consideration for sale of property of company.

of being, wound up altogether voluntarily ¹, and the whole or a portion of its business or property is proposed to be transferred or sold to another Company ², the liquidators of the first-mentioned Company may, with the sanction of a special resolution ³ of the Company by whom they were appointed, conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, receive, in compensation or part compensation for such transfer or sale, shares, debentures, policies, or other like interests in such other Company, for the purpose of distribution amongst the members of the Company being wound up ⁴, or may enter into any other arrangement whereby the members of the Company being wound up may, in lieu of receiving cash, shares, debentures, policies, or other like interests, or in addition thereto participate in the profits of, or receive any other benefit from, the purchasing Company.

Any sale made, or arrangement entered into, by the liquidator in pursuance of this section shall be binding on the members of the

Company being wound up⁵; subject to this proviso that, if any member of the Company being wound up, who has not voted in favour of the special resolution passed by the Company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the Company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may, by writing addressed and left as last aforesaid, require the liquidator to do one of the following things as the liquidator may prefer (that is to say):—either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned⁶; such purchase-money to be paid before the Company is dissolved⁷, and to be raised by the liquidator in such manner as may be determined by special resolution.

No special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to, or concurrently with, any resolution for winding-up the Company or for appointing liquidators; but, if an order be made within a year for winding-up the Company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court⁸.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 192, Sub-ss. (1) to (5) of the English Companies (Consolidation) Act of 1908.

The English Act uses the expressions "transferor Company" and "transferee Company" to denote the selling Company and the purchasing Company. Instead of the words "after the date of the meeting at which such special resolution was passed" in the 2nd paragraph of S. 204 of the Indian Act, the English Act uses the words "after the confirmation of the resolution." A

N.B.—Ss. 204 to 211 of the Act contain provisions relating to re-construction and amalgamation of companies.

(2) Re-construction—Meaning of.

The word re-construction is a commercial and not a legal term and even as a commercial term bears no exact definite meaning. A re-construction is effected where the assets and liabilities of an existing company are transferred to a new company formed for the purpose of continuing the business of the transferor company, and consisting substantially of the same share-holders. It involves that substantially the same

General—(Continued).

business shall be carried on and substantially the same persons shall carry it on. It is none the less a re-construction because all the assets do not pass to the new company and all the share-holders of the transferor company are not share-holders in the transferee company and the liabilities of the transferor company are not taken over by the transferee company. See *South African Supply Co.*, (1904), 2 Ch. 268; *Hooper v. Western Counties Co.*, (1892), W.N. 148; Halsbury's Law of England, Vol. V, p. 584. **B**

(3) Re-construction,*when sought.

(a) "A case for re-construction (as distinct from amalgamation) usually arises when it is desired to make some alteration in the objects, or to deal with the capital of the company in a manner which cannot be effected by the company as originally constituted and cannot be carried out or conveniently carried out, under the provisions in the Act for the alteration of the memorandum of association or the reduction of the capital of a company." *Emden's Winding-up of Companies*, 8th Ed., p. 316. **C**

(b) Thus, where it is sought to carry on some business which is not within the objects for which the company was formed, or to reduce, subdivide, or otherwise deal with the capital of the company or to issue new shares, with preferential rights, which could not be conferred by the company as originally constituted, or to get rid of founders, shares, a new company, is formed and registered so constituted that the desired object can be carried out, and the undertaking of the old company is sold under the provisions of this section to the new company in consideration of shares or other interests, in the new company; these the share-holders take in exchange for their interests in the old company. (*Ibid.*), pp. 316, 317. **D**

(4) Amalgamation—Meaning of.

To constitute amalgamation there must be a blending of substantially two or more existing undertakings into one undertaking, the share-holders of each blending company becoming substantially the share-holders in the company which holds the blended undertakings. An amalgamation may take place either by the transfer of two companies A and B to a new corporation C, or the continuance of A and B by B upon terms that the share-holders of A shall become share-holders in B. It is not necessary that there should be a new company. See *Per Buckley, J.*, in *South African Supply Co.*, (1904), 2 Ch. 268, 281, 287. See, also, *New Zealand Gold Co. v. Peacock*, (1894), 1 Q.B. 622, 632; *Wall v. London and Northern Corporation*, (1898), 2 Ch. 469, 479; *Empire Assurance Corp. v. E.P. Bagshaw*, 4 Eq. *Borax Co.*, (1899), 2 Ch. 130, on appeal (1901) 1 Ch. 326; *Lindley on Companies* 6th Ed., p. 1200. **E**

(5) Reasons for amalgamation.

The chief reason is to effect saving in expenses of management, director's fees, etc., and to prevent competition. Also, if the company is flourishing, there is a more ready market if the number of shares is increased. *Emden's Winding up of Companies*, 8th Ed., pp. 326, 327. **F**

General—(Continued).

(6) Amalgamation, how effected.

- (a) If there are two companies which wish to amalgamate and one of them has power to purchase the assets of the other, and has also sufficient un-issued shares to make the purchase, then one company resolves to wind up and sell its undertaking to the other for shares in the latter company. This is in fact a single reconstruction. See *Emden's Winding up of Companies*, 8th Ed., p. 327. **G**
- (b) The purchasing company must have power to accept the transfer under its memorandum of association. *Pulbrook v. New Civil Service Co-operation* (1877), 26 W.R. 11. **H**
- (c) If neither company has power to buy the assets of the other, a new company is formed for purchasing the assets of both. Then both the old companies resolve to wind up, and to sell their assets to the new company in consideration of shares in the new company. This is in fact a double re-construction. *Emden's Winding up of Companies*, 8th Ed., p. 327. *C.F. South African Supply Co.*, (1904), 2 Ch. 268. **I**

(7) Procedure under the section.

- (a) The liquidator or a creditor having prepared a scheme sounds the views of the largest creditors with the object of ascertaining whether they are disposed to concur before any further steps are taken under the Act, and if there is a fair prospect of the scheme being carried through, the liquidator or creditor applies to the Court for an order convening the requisite meetings. *Emden's Winding up of Companies*, 8th Ed., p. 331. **J**
- (b) On obtaining the order of the Court, the liquidator or creditor calls meetings in the matter directed by the order. (*Ibid.*) **K**
- (c) The scheme is then submitted to the meeting, and if approved by the requisite majority, is submitted to the sanction of the Court. (*Ibid.*), p. 332. **L**

N.B.—The scheme may be approved by the meeting "with such modifications as the Court may sanction." (*Ibid.*) **M**

- (d) Though the proper procedure is to obtain the sanction of the meeting before the sanction of the Court, the Court will not be astute in finding technical defects in the proceedings, and provided the necessary sanctions are obtained, the fact that they were not obtained in the proper order would not vitiate the scheme. *Dynevor Collieries Co.*, 11 Ch. Div. 605. **N**
- (e) If the petition for Court's sanction is presented in the first instance before the meeting is convened, the Court may adjourn the petition till the result of the meeting is known. See *Slater v. Darlaston Steel Co.* (1877), W.N. 189, 165. **O**

(8) Procedure where purchasing company requires sanction of a resolution.

- (a) If the purchasing company has power to make the purchase only with the sanction of a resolution, the resolution must be passed before the vendor company has resolved to wind up. *Emden's Winding up of Companies*, 8th Ed., p. 327. **P**

N. B.—Otherwise, if the vendor company first resolves upon winding up, it may find itself in difficulties, if the share-holders of the purchasing company refuse to sanction the arrangement. (*Ibid.*) **Q**

General—(Continued).

- (b) Likewise, the new company may require the sanction of a resolution if it is necessary to create new shares for the purpose of the arrangement. Such resolution should also be passed before the vendor company resolves to wind up. (*Ibid.*), p. 328. R

(9) Procedure where directors of old company are to be directors of new company.

If the directors of the vendor company are to be on the board of the purchasing company, due provisions must be made for this. If the purchasing company is a new company such provision will be contained in the articles. But if it is an existing company the provisions of its articles must be complied with, and if the power appointing directors is vested in a general meeting of the Company, the appointment must be so made. (*Ibid.*), p. 328. S

(10) Provision for payment to dissentients.

Due provision must be made in the scheme for raising sufficient sums for purchasing the interests of dissentient members. This may be effected by the agreement of sale providing that the new Company shall pay the liquidator all such sums as he may require to purchase the interests of the dissentients. If this course is not adopted the liquidator raises required sum by a sale of the shares in the new Company. Emden's Winding up of Companies, 8th Ed., pp. 318, 319. T

(11) Change of name.

If it is desired that the purchasing company should change its name and be registered in the name of the vendor company, a special resolution must be passed and the approval of the Local Government obtained under S. 36. Moreover, the consent of the old company must be signified in such manner as the Registrar requires. The change is not complete until the issue of the certificate of incorporation. See Ss. 36 and 43, *supra*; also *Shackleford v. Dangerfield*, L.R. 3 O.P. 407. U

(12) Mere change of name does not make a new Company.

A Company does not by merely changing its name and taking in new shareholders become a new Company or cease to be liable on debts incurred before the change. *Re Imperial Hydropathic Hotel Co.*, 49 L.T.R. 148. Y

(13) Provisions relating to re-construction and amalgamation.

A scheme of re-construction or amalgamation can be effected under the present section, or under S. 203, or S. 144, *supra*, or under powers conferred by the Memorandum of Association of a Company. Y-1

(14) Re-construction or amalgamation under the section.

A re-construction or amalgamation can be effected under the section not only where the winding up is purely voluntary but also where the winding up is under supervision. See *Re Imperial Mercantile Credit Association* (1871), L.R. 12 Eq. 514; *Re Cambrian Mining Co.*, (1882), 48 L.T. 114; See, also, *Agra and Masterman's Bank*, 12 Eq. 509, N. W

(15) Section whether applicable to compulsory winding up.

(a) In *London and Exchange Bank*, 16 L.T. 340, Lord Romilly held that notwithstanding *Agra and Masterman's Bank*, 12 Eq. 509 N., S. 161 of the English Companies Act of 1861, corresponding to the present section, was inapplicable to a Company in compulsory winding up. X

General—(Continued).

N.B.—Commenting on this Buckley says that the distinction was not well drawn, and that the principle of the observations in *re Agra and Masterman's Bank* and the language of the judgment in *Cambrian Mining Co.*, show this. See Buckley, 9th Ed., p. 431. **X-1**

(b) In order that the section may be applicable where a supervision or compulsory order is made, the order of events should be as follows:—*viz.*, (1) voluntary winding up and special resolution under the section either before or contemporaneously with or after the winding up of resolutions, (2) supervision or compulsory order. See Buckley, 9th Ed., p. 431. **Y**

(c) Where, however, the supervision or compulsory order precedes the special resolution under the section, the section does not apply though in such a case a re-construction can be effected under S. 144, *supra*. **Z**

(16) Sanction of the Court.

(a) Where the winding up is purely voluntary a scheme of re-construction may be effected without the sanction of the Court, but if the winding up is under supervision or compulsory, a scheme under the section requires the sanction of the Court. *Re Imperial Mercantile Credit Association*, 12 Eq. 504. **A**

(b) Where the winding up is under supervision, the liquidator may even without the sanction of the Court effect a sale and transfer of the Company. But he cannot do so under the present section. See *Wright's Case*, 5 Ch. App. 437. **B**

(17) Re-construction under S. 144.

Where the winding up is under supervision, or compulsory, a re-construction may also be effected by a sale and transfer of the assets under S. 144; a scheme under that section does not require a special resolution as one under the present section, but the Court will impose upon the Company the conditions of the present section as to the rights of dissentient share-holders. *Re Cambrian Mining Co.*, 48 L.T.R. 114; *Re Agra and Masterman's Bank*, 12 Eq. 509. N. **C**

(18) Re-construction under S. 203.

A re-construction may also be effected under S. 203, at the instance of a majority of creditors. Such a scheme requires the sanction of the Court, and the principles applicable to the rights of dissentient share-holders will be applied to dissentient creditors. See *Re Tunis Ry. Co.*, W.N. (1874), 121, 165. **D**

(19) Re-construction under powers in memorandum.

A scheme of re-construction or amalgamation may also be carried out, under powers given by the Memorandum of Association. Such a scheme cannot be carried out in disregard of the rights given to dissentients under this section. Any provision either in the Memorandum or the Articles of Association which purports to deprive dissentients of the option given to them under this section is *ultra vires* and cannot be enforced. See *Payne v. The Cork Co.*, (1900) 1 Ch. 308; *Baring-gould v. Sharpington etc.*, *Syndicate* (1899), 2 Ch. 80. **E**

General—(Concluded).

(20) Re-construction of unregistered companies.

An unregistered company which is not empowered by its deed of settlement to sell or transfer its business to another company may effect a sale by registering under the Act, passing a resolution to wind up voluntarily and taking steps under this section. *Southall v. British Mutual etc. Soc.*, 6 Ch. 614. F

(21) Application of section to mutual insurance societies.

The provision enabling the liquidator of the selling company "to receive in compensation.....policies" in the purchasing company shews that the section is applicable to mutual insurance societies: *Southall v. British Mutual Life Assurance Society*, 11 Eq. 65=6 Ch. 614. G

(22) Partial stay of winding up proceedings for purposes of reconstruction.

In the case of a winding up with a view to re-construction an order may be obtained for a stay of the winding up proceedings except certain specified ones such as payment of creditors, the creation of new capital, and resumption of business. See *Western Canada Oil Co.*, (1874) W.N. 148. H

1.—"Where any Company....voluntarily."

(1) Winding-up resolution need not refer to re-construction or amalgamation.

The validity of a re-construction or amalgamation is not affected by the fact that the winding up resolution does not expressly refer to re-construction or amalgamation. But the purpose of the winding up may be gathered from the whole of the circumstances which result in re-construction or amalgamation. *Re South African Supply and Gold Storage Co.*; *Wild v. Sama and Co.*, (1904), 2 Ch. 268. I

(2) Winding up resolution associated with other resolutions not regularly passed.

(a) The validity of a resolution for winding up is not affected by the fact that it is associated with other resolutions not regularly passed. See notes to S. 173, *supra*. J

(b) And where a resolution for voluntary winding up is passed with a view to a re-construction or amalgamation being carried into effect, the resolution may be valid though the intended amalgamation or reconstruction turns out to be invalid. *Clinch v. Financial Corporation*, 16 Eq. 868. K

(c) But where notice was given of resolutions for winding up for the purpose of a re-construction scheme, and at the meeting the only resolution put and carried was a simple resolution for winding up, it was held to be ineffectual, as resulting in something different from that of which notice was given. *Teede and Bishop*, (1901), W.N. 52=70 L.J. (Ch.) 409. L

2.—"The whole....to another Company."

(1) Sale of part of assets, valid.

An arrangement under which only a part of the assets and liabilities of the company are sold to a new company, leaving the rest of the debts of the old company to be paid by the liquidator, is valid. *City and County Investment Co.*, 18 Ch. D. 475; *Postlethwaite v. Port Phillips Co.*, 43 Ch. D. 452. M

2.—“The whole.....to another Company”—(Continued).

(2) Uncalled capital—Not assets.

The assets to be sold do not include uncalled capital. They must be assets existing at the time of the liquidation and do not include assets to be realized by calls after the sale is completed. See *New Zealand Gold Co. v. Peacock*, (1894), 1 Q.B. 622. See also *Chinch v. Financial Corporation*, (1868), 4 Ch. App. 117. N

(3) Unpaid calls are assets.

But calls made but not paid are assets that may be transferred. See *Sankey Brook Co.*, (1870), 10 Eq. 381. O

(4) Agreement to make a call.

So also the benefit of an agreement to make a call before liquidation, may be sold as assets. *New Zealand Gold Extraction Co. v. Peacock*, (1894), 1 Q.B. 622. P

(5) Sale with an option to re-purchase.

A ——— is valid, and has been sanctioned. *Cambrian Mining Co.*, 48 L.T. 114. Q

(6) Sale to an individual.

A sale or transfer under this section can be made only to a company. It cannot be made to an individual speculator who intends to form and make a profit, by forming a new company. It must be a sale direct from a company to the other. *Bird v. Bird's Sewage Co.*, 9 Ch. 358; *Re Hester and Co.*, (1875), 44 L.J. (Ch.), 757, 759, C.A. R

(7) Sale to an agent of unformed company.

But a sale to an agent or trustee for a company to be formed is good. *Hester and Co.*, (1875), 44 L.J. (Ch.) 757, 759; *Postlethwaite v. Port Phillips Gold Co.*, 43 C.D. 452. S

N.B.—But the Court of appeal appeared doubtful about this; in *Re Canning Jarrah Timber Co.* (1900), 1 Ch. 708. T

(8) Sale to a foreign company.

A sale may be made to a foreign company or one not formed under the Act, *Irrigation Company of France*, Ex. p. Fox, 6 Ch. 176, 192. U

(9) Sale to a newly formed company.

The purchasing company may be one formed for the purpose of taking over the business of the company being wound up. *Imperial Mercantile Credit Assurance*, 12 Eq. 504. V

Quære:—Whether the purchasing company should not be an existing company and not merely one formed after the sale is effected. See *Canning Jarrah Co.*, (1900), 1 Ch. 708, 714. W

(10) Sale to an unlimited company.

A limited company may, under this section, transfer its business to an unlimited company with different objects. *United Portsmouth Insurance Co.*, *Brown's case*, *Tucker's case*, 41 L.J. Ch. 157. X

(11) Conveyance to trustees for benefit of creditors, void.

A conveyance by a company of all of its property to trustees for the benefit of all its creditors is void under S. 213 of this Act. Y

2.—“The whole.....to another Company”—(Concluded).

(12) Injunction to restrain a sham sale.

If the liquidators enter into a sham sale and transfer, the Court will restrain it by injunction. *Re Agra and Masterman's Bank*, 15 W.R. 554; *Re Albert Life Assurance Co.*, 40 L.J. Ch. 515. Z

(13) Sale under the section valid though *ultra vires* of the company.

The power of sale conferred by this section is in addition to any powers which the company may have under its regulations, and may be exercised although *ultra vires*, of the company. *Clinch v. Financial Corporation* (1868), L.R. 5 Eq. 450, 472, affirmed (1868), 4 Ch. App. 117, 121, 123; *Nicholl v. Eberhardt Co.*, (1889), 61 L.T. 489 C.A. cited in Halsbury's Laws of England, Vol. V, p. 586. A

(14) Scheme not to impose fresh liability on share-holders.

(a) This section contemplates a sale of the assets of the liquidating company for such an equivalent in value as is pointed out in the section, and does not contemplate the subjecting of the share-holders in the liquidating company without their unanimous consent, to a fresh and original liability. See *Per Cairns* L.C. 1868 in *Clinch v. Financial Corporation*, 4 Ch. App. 121. B

(b) Thus, a scheme under which the selling company guarantees the sufficiency of the assets sold for paying its creditors by providing that if the assets are not sufficient for the purpose, the deficiency is to be made up by calls. (*Ibid.*) C

N.B.—It makes no difference that the liability is imposed only on the assenting members and not on the dissentients. (*Ibid.*) D

N.B.—But it is not illegal to provide that the purchasing company shall pay the debts of the selling company, and that if the debts exceed the selling company's assets, the selling company shall be debtor to the purchasing company for the deficiency and a call may be made to provide for it. *Bank of South Australia*, (1895), 1 Ch. 578. See Buckley, 9th Ed., p. 43. E

N.B.—This was not a re-construction but a sale merely in consideration of the purchasing company undertaking the debts of the old company. See Emden's Winding up of Companies, 8th Ed., p. 324. F

(15) Payment of premium on consideration shares.

An arrangement is invalid, which provides for payment by the share-holders of the transferor company something not towards the capital of the transferee company, but by way of premium on the shares they are to receive, to be carried to the reserve fund of the transferee company. *Imperial Bank of China etc. v. Bank of Hindustan, China and Japan*, 6 Eq. 91. G

(16) Lien over shares—Effect of transfer.

A company having a lien on the shares can claim the lien on the money representing the shares in a sale of the company's assets. 1 E. P. Lewis, 6 Ch. 818. H

3.—“With the sanction of a special resolution.”

Notice of meeting must refer to proceedings under the section.

(a) A special resolution under the section is invalid unless the notice convening the meeting clearly states that the transfer is to be made under this section. *Imperial Bank of China etc. v. Bank of Hindustan etc.*, 6 Eq. 91; also *Irrigation Co. of France, Ex p. Fox*, 6 Ch. 176, (193). I

3.—“With the sanction of a special resolution”—(Concluded).

- (b) Thus, where the articles of association of a company contained a power of amalgamation, and a notice of a meeting merely stating that an agreement for amalgamation would be submitted for approval and resolutions for voluntarily winding up and for appointment of liquidators would be proposed, the notice was held to be insufficient as it did not clearly specify that this was to be a proceeding under S. 161 of the English Companies Act of 1862 (corresponding to the present section). *Imperial Bank of China, India and Japan v. Bank of Hindustan, China and Japan*, 6 Eq. 91. J

4.—“Receive in compensation....amongst the members of the Company being wound up.”

(1) Sale for partly paid shares.

The shares in the new company which constitute the consideration for a sale and transfer of assets may be partly paid only, thus imposing a liability on the members *qua* members of the new company. *Bisgood v. Henderson's Transvaal Estates*, (1908), 1 Ch. at p. 760; *City and County Investment Co.*, 13 Ch. D. 475; *Postlethwaite v. Port Phillips Co.*, 43 Ch. D. 452. K

(2) Written contract to be filed if consideration shares are paid up.

If the shares in the purchasing company are issued as wholly or partly paid, the provisions of S. 28, *supra*, as to the filing of a written contract with the Registrar of Joint Stock Companies, must be complied with. See *New Eberhardt Co.*, 43 Ch. D. 118; *Elsner and McArthur's case* (1895), 2 Ch. 759. L

(3) Provision for *bonus* or other benefit to directors.

- (a) The agreement for amalgamation may provide for payment to the directors of a special benefit, such as a *bonus* or compensation for the loss of their office, out of the purchase-money. Such a provision does not affect the validity of the amalgamation. But care must be taken to make a disclosure of it to share-holders. *Southall v. British Mutual Life Assurance Co.*, 6 Ch. 614; *Kaye v. Croydon Tramways Co.* (1898), 1 Ch. 358; *Tiesson v. Henderson* (1899), 1 Ch. 861; *Normandy v. Ind. Coope and Co.* (1908), 1 Ch. 84. M

- (b) But after the company has gone into liquidation the company has no power to pass a resolution for compensating officials for loss of employment or for remunerating them for past services. *Rutton v. West Cort Ry. Co.*, 23 Ch. D. 654; *Strond v. Royal Aquarium* (1908), W.N. 146. N

(4) Arrangement to pay calls in instalments—Not enforceable in winding up.

An arrangement under which calls on shares in the new company are payable in instalments, though enforceable while the company is a going concern, will not, if the new Company is wound up before all the instalments are paid, prevent the liquidator of that Company from making an immediate call of the whole amount due on the shares. *Cordova Union Gold Co.*, 2 Ch. 580. O

(5) Consideration shares, not assets of old company.

- (a) Where a *bona fide* sale and transfer of the business of a company is made for shares in another company, and the consideration shares are

4.—“Receive in compensation.....amongst the members of the Company being wound up”—(Continued).

distributed among the members of the old company, such shares are not the assets of the old company and are not liable for payment to creditors of that company. *Cardiff Preserved Coal Co. v. Norton*, 2 Ch. App. 409. See also, 3 B. 299 (309). **P**

- (b) A share-holder to whom fully paid shares and partly paid debentures are given in exchange for partly paid shares under a scheme of re-construction cannot treat the instalments paid on his debentures, as a reduction of his liability to the old company. *Ex. P. Jeaffreson*, 11 Eq. 109. **Q**

(6) Vendor company not entitled to get back assets on failure of purchasing company.

Where, under a scheme of amalgamation a purchasing company had undertaken to indemnify the vendor company against all liabilities and was eventually wound up, it was held that the vendor company was not entitled to get back the assets, on the principle of lien. *In re Albert Life Assurance Co.*, 11 Eq. 164. **R**

(7) Consideration to be distributed before closing of winding up.

The consideration for the sale must be distributed among the members of the old company before the close of its winding up. See Emden's Winding up of Companies, 8th Ed., p. 325. **S**

(8) Consideration for sale—Mode of distribution.

- (a) This section enables the company to determine only the nature of the consideration to be accepted, but not the mode in which it is to be distributed in the winding up. *Griffith v. Paget*, 5 Ch. D. 894. **T**

- (b) The effect of the exercise by the liquidators of the power of sale and transfer under this section is to substitute the shares, debentures, policies and other like interests in the transferor Company for the business or property so transferred or sold—in other words, merely to change the character of the assets applicable to the payment of creditors. 3 B. 299 (307). **U**

- (c) The rule of distribution is that contained in S. 177 (a) *supra*, i.e., that the proceeds shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company. (*Ibid*). Cf. *Lake View Co.*, W.N. (1900), 44. **V**

- (d) If there are preference and ordinary shares in the old company (the preference being as to capital and not to dividends merely) an arrangement under which the shares in the new company are to be distributed so as to benefit the deferred shares at the expense of the preferred, is invalid. *Griffith v. Paget*, 5 Ch. D. 894. **W**

- (e) If the preference is as to dividends only and not as to capital, the consideration shares both ordinary and preference, shall, unless the regulations of the old company otherwise provide, be distributed among the shareholders *pro rata*. An arrangement under which the preference shares in the new company are to be distributed among preference shareholders and ordinary shares among the ordinary share-holders of the old company is invalid. (*Ibid*) See also. *Simpson v. Palace Theatre* W.N. (1898), p. 91. **X**

4.—“Receive in compensation.....amongst the members of the Company being wound up”—(Continued).

- (f) If however, the articles prescribe a mode of distribution not according to the rights and interests of the members *inter se*, but in some other manner, e.g., in the manner to be determined by a special resolution, a distribution made in accordance with the articles is good, for under S. 177 (a) the assets are to be distributed among members according to their rights and interests *unless the regulations otherwise provide*. See *Simpson v. Palace Theatre Co.*, 69 L.T. 70. Y

(9) Limit of time for application of shares in the new company.

- (a) A scheme is not invalid by reason of the fact that it fixes a limit of time, such limit being reasonable, within which share-holders are to elect whether they will take shares in the new company or not. See *Postlethwaite v. Port Philip Gold Co.*, 43 Ch. D. 452. See also, *Zuccant v. Naupai Co.*, 61 L.T. 176=1 Megone 230; *Burdett-Coutts v. True Blue* (1899), 2 Ch. 616, 624. Z

- (b) Thus, where a scheme fixed a limit of a fortnight, *held* the exercise of the option more than two months after was too late. (*Ibid*). A

- (c) Even if no time is fixed the election must be made within a reasonable time. It is of the highest importance for a person having a right to join the new company to be diligent in exercising such right. *Weston v. New Guston Co.*, 60 L.T.R. 805. *Postlethwaite v. Port Philip Gold Co.*, 43 Ch. D. 452. B

- (d) He will lose his right to claim the new shares if he lies by to see whether they will rise in value. *Weston v. New Guston Co.*, 60 L.T.R. 805. C

- (e) A share-holder who does not apply for shares in the new company within the time fixed cannot as a rule obtain allotment of the shares or damages. *Weston v. New Guston Co.*, 62 L.T. 275. *South African Petroleum Fields, Ltd.*, W.N. (1894) 189. D

(10) Allotment to an underwriter of shares not applied for.

An agreement is valid which provides that shares not applied for, within a limited time by the share-holders, may be allotted by the new company to an underwriter. *Burdett-Coutts v. True Blue (Hannans') Gold Mine* (1899), 2 Ch. 616; *Fuller v. White Feather* (1906), 1 Ch. 823. E

N.B.—But, if such an agreement were submitted for the sanction of the Court, probably the Court would refuse to sanction it. *Burdett-Coutts v. True Blue (Hannans') Gold Mine* (1889), 2 Ch. 616; *Canning Jarrah Timber Co.*, (1900), 1 Ch. 708. See also *Nicholl v. Eberhardt Co.*, 61 L.T. 489. F

(11) Sale of shares not applied for distribution of proceeds.

- (a) Though the new company may have a right to dispose of shares not applied for within the time fixed, the members who did not elect within the time cannot be deprived of the proceeds of the sale of those shares. See *Manners v. St. David's Mines, Ltd.*, (1904), 2 Ch. 503. G

- (b) Thus, a scheme cannot provide that where members do not elect to take shares in the new company, their shares are to be sold and the proceeds to be paid to the new company. (*Ibid*). H

4.—“Receive in compensation.....amongst the members of the Company being wound up”—(Continued).

(12) Offer for shares in the new company.

An intimation given by the liquidator to a member of the selling company that he shall be entitled to an allotment of shares in the purchasing company is not an offer, but is merely an invitation to make an offer. If the member applies to the new company claiming his allotment, the application is an offer and can be withdrawn at any time before acceptance. See *Re Metropolitan Fire Insurance Co.*, *Wallace's case*, 1900, 2 Ch. 671. I

(13) Allotment of shares direct to share-holders of old company.

(a) An agreement under this section may stipulate for the distribution of the shares in the new company directly among the share-holders of the transferring company and not to the liquidator, in the first instance. *City and County Investment Co.*, 13 Ch. D. 475; *Basye Mining Co.*, *Dyett's case*, 43 L.T. 85. J

(b) They should generally be allotted in this way as they may impose liability on the allottee. *Basye Mining Co.*, *Dyett's case*, 43 L.T. 85. K

(14) Failure of consideration—Re-payment to members of money paid on shares.

A member of a selling Company who paid money for shares in the selling Company under a void amalgamation was held entitled to re-payment of the money in the winding up of the purchasing Company, the consideration having failed under a common mistake of law and fact. *E.P. Alison, Re Bank of Hindustan China and Japan* 42, L.J. Ch. 505, following, *Re London and Exchange Bank*, 16 L.T.R. 340. L

(15) Sale by liquidator of shares taken by member.

A liquidator who erroneously sells the shares which a member has agreed to take, cannot be made liable for damages in the winding up. *Hills Waterfall Estate Co.*, (1896), 1 Ch. 947, but see *Pulsford v. Devenish* (1903), 2 Ch. 625. M

(15-a) Sale and transfer, a virtual dissolution.

When a Company has transferred all its property and business to a new Company and all the shareholders in the old Company have accepted shares in the new Company in exchange for their own, such an amalgamation operates as a virtual dissolution of the old Company; and ex-shareholders in the old Company, though they remain liable to creditors of the old Company, cannot by an attempted resuscitation deal with their shares in the old Company as it were a going concern. *Chappel's case*, 6 Ch. App. 902; *Allin's case*, 16 Eq. 454; *Re Taurine Co.*, 25 Ch. D. 137 cited in *Manson*, p. 999. N

(16) Validity of re-construction, or amalgamation, how impeached.

(a) A transfer or amalgamation under this section can be impeached by a shareholder only by an action. Its validity cannot be determined by a petition. *Imperial Bank of China etc.*, 1 Ch. 339, 347. *Financial Corporation W.N.* (1866), 162; *International Life Assurance Society*, 20 L.T. 433.

N.B.—But see *City and County Investment Co.*, 13 Ch. D. 475, where the validity of the agreement was determined on appeal. O

(b) Where pending an action to try the validity of a sale and transfer, a winding up petition was presented, the Court ordered it to stand over till the action was heard. *Re Financial Corporation* (1866), W.N. 162. P

4.—“*Receive in compensation.....amongst the members of the Company being wound up*”—(Continued).

(c) The action may be brought by a dissident on behalf of himself and all other share-holders, though the scheme has been assented to by a large number of share-holders and has been actually carried into effect. *Clinch v. Financial Corporation*, 5 Eq. 450 = 4 Ch. 117; *Bird v. Bird's Sewage Co.*, 9 Ch. 358. Q

(d) But if the arrangement though irregular is *intra vires* the company, and is capable of confirmation, the Court will not grant leave to a share-holder to use the company's name in an action to restrain the arrangement. *Re Irrigation Co. of France, E.P. Fox*, 40 L.J. Ch. 496; *Hester and Co.*, 44 L.J. Ch. 620. R

N.B.—An amalgamation cannot be set aside on the admissions of the liquidators; the fact must be regularly proved. *Re Empire Corporation*, 20 L.T.R. 103. S

(17) Action barred by delay or acquiescence.

Acquiescence or delay may bar the action where the sale though unauthorized is made *bona fide*. See *Clinch v. Financial Corporation*, 4 Ch. 117 = 5 Eq. 450; *Hafod Hotel Co.*, 18 L.T. 144. T

(18) Member of selling Company, liability of, as member of purchasing Company, when amalgamation fails.

Where during the progress of proceedings for amalgamation a share-holder of the selling Company applies for shares in the purchasing Company, and the proposed amalgamation falls through, the question arises whether the application is subject to a condition precedent that has not been fulfilled. This question may be solved by applying the following tests :—

(a) If the share-holder enters into no personal negotiation with new Company, but only acts through the old Company, he is not bound, unless the amalgamation is eventually completed. *Dougan's case, Re Empire Assurance Corporation*, 8 Ch. 540, 546; *Beck's case*, 9 Ch. App. 395; *Alabarter's case*, 7 Eq. 273. U

(b) But if instead of acting through the selling Company he makes a personal application to the purchasing Company, and the shares are registered in his name, he is liable though the amalgamation does not take place. (*Ibid.*) See also *Hare's case*, 4 Ch. 503; *Challe's case*, 6 Ch. 266. Y

(19) Liability by estoppel.

(a) A member who has accepted shares in the new company may by his conduct be estopped from denying his liability as a member of the new company though the amalgamation turns out to be void. *Bank of Hindustan, China and Japan*, 42 L. J. Ch. 505 = 9 Ch. App. 1. W

(b) But where an amalgamation was declared void, a member of the old Company was not, by the fact that he applied for shares, paid a deposit and received a notice of calls without objecting, estopped from denying that he had become a share-holder in the new Company inasmuch as he had thus acted on a mistaken representation on the part of the new Company. *Bank of Hindustan v. Alison*, L. R. 6 C. P. 222; see also *Brigg's case, Re Western Insurance Co.*, 19 L.T.R. 758. X

4.—“Receive in compensation.....amongst the members of the Company being wound up”—(Concluded).

(20) Shares held in trust under authority to retain “in present form.”

Where an estate is held in trust with an authority that a part of the estate consisting of shares in a company, shall be retained ‘in its present form’ shares which come to a trustee under a scheme of re-construction are covered by the authority. *Smith v. Lewis* (1902), 2 Ch. 667, C. F. *Re Anson* 1907, W. N. 196. Y

(21) Injunction against the old company does not bind the new company.

The new company is in no sense the servant or agent of the transferor company and is not bound by injunctions granted against it. *Bosch v. Simms Manufacturing Co.*, (1900). See *Halsbury's Laws of England*, Vol. V, p. 591. Z

5.—“Any sale.....being wound up.”

(1) Sale under the section binds creditors and share-holders.

(a) Though the section does not mention creditors, still, a sale and transfer of a company's assets under this section is binding on both creditors and share-holders of the transferor company. *City and County Investment Co.*, 13 Ch. D. 475. A

N.B.—A sale and transfer under the section is not void by reason of the claims of creditors not being previously satisfied or secured. 3 B. 299 (307). B

(2) Creditor's remedy when his debt is unpaid.

(a) The remedy of a creditor who cannot get payment of his debt is to obtain a supervision or compulsory order within a year, in which case the special resolution authorizing the re-construction is rendered invalid by the last para. of this section unless it is sanctioned by the Court. *City and County Investment Co.*, 13 Ch. D. 475; *Bisgood v. Henderson's Transvaal Estates*, (1908), 1 Ch. at p. 760. C

(b) But creditors having a mortgage over the company's assets may, under the terms of their mortgage, be entitled to prevent a sale of the assets. *Borax Co.* (1899), 2 Ch. 180, cited in *Halsbury's Laws of England*, Vol. V., p. 586. D

6.—“If any member.....hereinafter mentioned.”

(1) Courses open to share-holders on re-construction.

When a scheme is proposed under this section, a share-holder has three courses open to him:—(1) he may assent to the resolution, (2) he may remain neutral without either assenting or dissenting, or (3) he may dissent within the time and in the manner provided in the section. *Los' case, Re Bank of Hindustan*, 11 Jur. N. S. 661. E

(2) Effect of neither assenting nor dissenting.

A member who has neither assented to the scheme nor dissented in the manner and within the time specified in the section cannot on that account be forced to take shares in the new company. The only consequence of his not so dissenting is that he is deprived of the provision for the purchase of his interest and must either accept the new shares or take nothing. *Clinch v. Financial Corp.*, 4 Ch. 117; *Empire Assurance Corp.*, 4 Eq. 341; *E.P. Fox*, 6 Ch. 176. *Bank of Hindustan etc. Los' case*, 13 W.R. 888=12 L.T. 690=34 L.J. (Ch.) 609=11 Jur. (N.S.) 661; *Higgs' case*, 2 H. and M. 657; *Martin's case*, 2 H. and M. 669. F

6.—“If any member.....hereinafter mentioned”—(Continued).

(3) Rights of a dissentient member.

A member who expresses his dissent from the resolution in the manner and within the time specified in the section can call upon the liquidators either to abstain from carrying the resolution into effect or to purchase the dissentient's interest in the Company. **G**

(4) Proviso for purchase of dissentient's interest, object of.

The object of this proviso relating to the purchase of the dissentient's interest is to enable the liquidator acting for the company to buy off the opposition of a share-holder to the proposed rule and transfer. *De Rosaz v. Anglo-Italian Bank*, L.R. 4 Q.B. 474. **H**

(5) Liquidator's duty on receipt of notice of dissent.

“On receipt of the notice of dissent it becomes the duty of the liquidators to elect which of two courses they will pursue; they must either abstain from carrying their resolution, or purchase the interest held by the dissentient member”. *Per Hannen in De Rosaz's case*, L.R. 4 Q.B. at p. 474. **I**

(6) Election by liquidators to purchase dissentient's interest, effect of.

If the liquidators have manifested their election to purchase the dissentient's interest, it is not open to them afterwards to withdraw from that election. When the election is made, a valid contract is entered into for the purchase and sale of interest of the dissentient share-holder and it is immaterial whether the price is ascertained by agreement, or by the mode substituted for agreement, namely, by arbitration. *Per Hannen, J.*; in *De Rosaz's case*, L.R. 4 Q.B. at p. 474, referred to in 7 B. 494. **J**

(7) Notice of dissent—Contents of.

- (a) A notice of dissent given by a share-holder must state not only that he dissents from the resolution but also that he requires the liquidator either to abstain from carrying the resolution into effect or to purchase his interest. *Union Bank of Kingston-Upon-Hull*, 13 Ch. D. 808. **K**
- (b) A notice which conveyed merely an expression of dissent from the resolutions previously arrived at, but contained no express intimation that the dissentient shareholder would claim his proportion of the assets and that steps should be taken with a view of paying to him the value of his shares, was held not a sufficient notice. 7 B. 494 (508). **L**
- (c) But a notice which is valid in other respects is not invalidated by reason of the fact that alternative demand requires his shares to be purchased at the amount he had paid for them instead of at the price to be determined by agreement or arbitration. *Re Anglo-Italian Bank and De Rosario*, L.R. 2 Q.B. 452. **M**

(8) Notice of dissent—No particular form required.

The Act prescribes no particular form of words in which the notice is to be given. Any notice, in writing, however expressed would be sufficient if it clearly conveyed to the liquidators the dissent of the share-holder from the resolution and his demand that they should either abstain from carrying the resolution into effect, or purchase his interest in the manner prescribed by the Act. 12 B. 526 (533). **N**

6.—“If any member.....hereinafter mentioned”—(Continued).

(9) Notice referring to section—Omissions in—Effect of.

- (a) A notice of dissent which states that the member dissents from the resolution, and that the notice is one given under this section is not insufficient by reason of the fact that it only requires the liquidators to purchase the dissentient's interest in the Company and does not state the alternative course open to them under the section, to abstain from carrying the special resolution into effect; for, the reference to the section contained in the notice is sufficient to incorporate into it the other alternative, and renders it a notice which gives the liquidators the option which they are entitled to exercise under the section. 12 B. 526. O

- (b) Thus, a letter in the following terms was held to be a sufficient notice:—

“With reference to the resolutions to winding up the above Company, and which were passed and confirmed on the 14th instant, we hereby give you notice under S. 204 of the Indian Companies Act VI of 1882, and require you to purchase the interest held by us in the said company at such price as may be determined either by private agreement or by arbitration as we are dissentients from such resolution.” 12 B. 526. P

(10) Notice before confirmation of resolution.

Where after the passing and before the confirmation of the resolution for voluntary winding up with a view to re-construction, a share-holder served a notice of dissent addressed to the secretary or liquidator of the company, and the company did not take any objection to the notice until a month after the confirmation of the resolution, the notice was held valid. *London and Westminster Bread Co.*, (1890) W.N. 3=62 L.T. 224=38 W.R. 277. Q

N.B.—But probably a notice given before any resolution is passed would not be a valid notice. (*Ibid.*) R

(11) Irregularities in notice—Waiver of.

However informal and irregular a notice of dissent may be, the liquidators may waive the irregularity, and the dissentient would then be entitled to proceed as if the notice had been perfectly formal and regular. 7 B. 494. S

(12) Notice by share-holder not on the register.

Where a transfer is not registered before re-construction, a notice given by the transferee is valid, provided the transferee obtains a rectification of the register *nunc pro tunc* by getting himself registered as a member as of a date before he dissented. *Sussex Brick Co.*, (1904), 1 Ch. 598. T

N.B.—So long as a transferee who is entitled to be registered is not registered as a share-holder, the transferor is a trustee for the transferee. See *Rooney v. Stanton* (1900), 17 T.L.R. 28. U

(13) Rights of dissentients cannot be excluded.

- (a) A sale and transfer of all the business and property of a Company whether made under this section or under powers conferred by the Memorandum of Association is invalid if it deprives the dissentients of their rights under the section. Y

6.—“If any member.....hereinafter mentioned”—(Concluded).

- (b) A provision in the Memorandum of Association of a Company for the sale of all its assets and undertaking and for the distribution of the proceeds does not enable the Company to make a sale and distribution on terms other than those which this section imposes. See *Bisgood v. Henderson's Transvaal Estates* (1908), 1 Ch. 743, overruling; *Cotton v. Imperial Corp.* (1892), 3 Ch. 454; *Doughty v. Lomagunda Reefs* (1902), 2 Ch. 857 = (1903), 1 Ch. 673; *Fuller v. White Feather* (1906), 1 Ch. 823. W
- (c) Any provision in the Memorandum or Articles of Association empowering the liquidator to sell and distribute all the assets in a manner not authorized by this section is *ultra vires* and cannot be enforced. See *Bisgood v. Henderson's Transvaal Estates*, (1908), 1 Ch. 743; *Payne v. The Cork Co.*, (1900), 1 Ch. 308; *Buring-Gould v. Sharpington etc., Syndicate* (1899), 2 Ch. 80. X
- (d) The Legislature has conferred on the liquidators the power to sell for shares subject to certain safeguards, and this impliedly prohibits a sale for shares by a liquidator without those safeguards. *Payne v. Cork Co.*, (1900), 1 Ch. 308. Y

N.B.—But it may be different where the sale is of part of the assets only. See *Wall v. London and Northern Assets Corporation* (1898), 2 Ch. 469, C.A. Z

(14) Re-construction at the instance of creditors—Rights of dissentient creditors.

- (a) Where a scheme is sanctioned at the instance of a majority of creditors under S. 203 *supra*, the principles applicable to dissentient shareholders under the present section are applied to dissentient creditors. *Re Tunis Railways Co.*, 10 Ch. D. 274 N., affirmed on appeal in (1874) W.N. 165 = 30 L.T. 512 = 31 L.T. 264. A
- (b) Thus, where a large majority of debenture holders of an insolvent company were in favour of a scheme of re-construction, the Court, in spite of the dissent of a small minority of debenture holders, sanctioned a scheme of re-construction under which the dissentient debenture holders were to receive the then value of their debentures. *Re Tunis Railways Co.*, 10 Ch. D. 270 N., affirmed on appeal in (1874) W.N. 165 = 30 L.T. 512 = 31 L.T. 264. B

(15) Dissentient's liability as contributory.

- (a) A sale and transfer under the section does not release a dissentient shareholder from his liability as a contributory in the winding up of the old company. The section merely provides for the purchase by the liquidator of the dissentient's interest, that is, of his right to share in the surplus after all debts are paid. The fact that such purchase is carried out by a transfer of his shares makes no difference to his liability. *Imperial Land Co. of Marseilles, Vining's case*, 6 Ch. 96. C
- (b) But the dissentient will not incur any liability in respect of the arrangement so made and from the costs of the liquidation. *Re Marine Investment Co., E.P. Poole's Executor's*, 8 Ch. 702, 710. D
- (c) And it seems that even his liability to the creditors of the old company would be extinguished after a year. See *City and County Investment Co.*, 13 Ch. D. 475. E

7.—“Such purchase-money to be paid before the company is dissolved.”

(1) Dissentients' claims to be satisfied before assets are parted.

If the company is going to part with all its assets, and only the shares in the new company will remain to satisfy the dissentients' claims, the liquidators may be required to give an undertaking not to part with the assets until the dissentients have been paid the value of their shares. *Hester and Co.*, 44 L.J. Ch. 757 = 1875 W.N. 179; *Bisgood v. Henderson's Transvaal Estates* (1908), 1 Ch. at p. 760. F

N. B.—The object of the provision that the purchase money is to be paid before the old company is dissolved is to preserve the dissentient's remedy against the assets of the old company for payment of his demand. *Re Hester and Co.*, 44 L.J. Ch. 757. G

(2) Suit by dissentient for recovery of purchase money.

(a) Where the liquidator has elected to purchase the interest of a dissentient share-holder, and the price is either agreed upon or arbitrators are appointed, there is a contract binding upon the company for the sale and purchase of the dissentient's shares. The share-holder is to be considered as having withdrawn from the partnership, and if the purchase money in respect of his interest is not paid, he may sue the company for the same either on the agreement or the award. *De Rosas v. Anglo-Italian Bank*, L.R. 4 Q.B. 462. H

(b) To such an action, the company can plead any set off or equitable defence. (*Ibid.*). I

8.—“If an order....sanctioned by the Court.”

(1) Compulsory or supervision order, who can obtain.

(a) As a rule only creditors can obtain a supervision or compulsory order under the proviso to the section; the object of the proviso is to protect creditors by reserving their rights. A resolution under this section is generally binding on share-holders and cannot be set aside at their instance. *Re Callao Bis. Co.*, 42 Ch. D. 169. J

N.B.—The policy of the proviso is to protect creditors by reserving their rights. (*Ibid.*). K

(b) But when a scheme of re-construction or amalgamation appears unfair, a compulsory order will be made even at the instance of share-holders, with a view to prevent the scheme being carried through without the sanction of the Court. *Consolidated South Rand Mines*, 1909, W.N. 35. L

(2) Sanction of Court.

An order of the Court sanctioning a scheme under the last para. of the section should be made either before making the supervision or compulsory order or simultaneously with such order. The sanction cannot be given subsequent to such order, *Re Callao Bis. Co.*, 42 Ch. D. 169. M

N.B.—The liability to have a re-construction avoided by reason of a compulsory or supervision order being obtained within 12 months may render it expedient to apply forthwith for a supervision order in order to be able to apply immediately for the sanction of the Court. *New Flag Staff Co.*, W.N. (1889), p. 123. N

8.—“If an order.....sanctioned by the Court”—(Concluded).

(3) Guide to Court's discretion in granting sanction.

(a) In granting or refusing its sanction to a scheme under the section the Court will see whether that everything has been fairly done and put before the creditors and share-holders, and whether they have been informed of all that they ought to be informed of; that a decision has not been snatched by surprise; that there has been nothing which would reduce the Court to say there has been either a surprise or fraud upon the persons sought to be affected by it. *Per Lord Hatherly V.C., In re Agra and Masterman's Bank*, L.R. 12 Eq. 509 note, cited in 3 B. 299. O

(b) A Company *bona fide* sold its business and property in consideration for shares in another Company. The new Company also undertook to discharge all the first debts and liabilities of the old Company. The new Company worked for a time and was then wound up before it discharged all the debts of the old Company. Then, the winding up of the old Company was ordered to be continued under the supervision of the Court, and the new Company applied to obtain the sanction of the Court for the sale and transfer to the new Company. The Court gave its sanction in spite of the opposition of some of the unsatisfied creditors of the old Company who insisted that sanction should be refused except upon the condition that they should be paid in full out of the property of the old Company. 3 B. 299. P

(c) Where the scheme is approved by the majority and is clearly advantageous, the Court will not withhold its sanction merely by reason of suggestions of possible liabilities to the dissentients unless it appears that the liabilities will in fact ensue. *Marine Investment Co., E. P. Poole's Executors*, 8 Ch. 702. Q

205. The price to be paid for the purchase of the interest of any dissentient member may be determined by Mode of determining price. agreement. If the parties dispute about the same, such dispute shall be settled by arbitration under the provisions next hereinafter contained.

(Notes).

General.

(1) Corresponding English law.

This section corresponds to the last words in S. 192 (3) of the English Companies (Consolidation) Act of 1908. R

(2) Price of dissentients' interest—When to be settled by arbitration.

If a dissentient share-holder does not accept shares in the new company or the price fixed by the liquidator as the value of his interest, the price of the dissentients' interest must be settled by arbitration. *Imperial Mercantile Credit Association*, 12 Eq. 504. S

(3) Fairness of price offered by liquidator—Onus of proof.

Where the dissentient and the liquidator do not agree as to the price of the dissentient's interest and the matter is referred to arbitration, it is upon the liquidator to show that the price offered by him was a fair one. *Morgan's case*, 28 Ch. D. 620. T

General—(Concluded).**(4) Inspection of company's books by a dissentient share-holder.**

A dissentient share-holder who has refused to accept the price offered by the liquidator and has claimed an arbitration is not entitled while the arbitration is pending but before any steps have been taken under it beyond naming the arbitrators, to inspect the company's books and papers which have been handed over to the new company, in order to see whether it would be advantageous to accept the offer. *Glamorganshire Banking Co.*, *Morgan's case*, 28 Ch. D. 620=33 W.R. 209.U

(5) Examination of company's officers by dissentient share-holder.

Nor is a dissentient entitled to examine the directors and the liquidator of the old company under S. 163 with a view to obtain information as to the value of his shares. *British Building Stone Co.*, (1908), 2 Ch. 450. Y

N.B.—But Buckley says that inasmuch as that value must include his share of what, if anything, ought to be contributed by misfeasants to the assets of the company, it is not obvious why a share-holder who has demanded the value of his interest should be precluded from proceedings for misfeasance and any facilities for supporting them. There is no doubt a discretion to be exercised, having regard to all the circumstances. See Buckley, 9th Ed., p. 438. W

(6) Order to pass liquidator's accounts, after resolution for re-construction.

After the passing by resolutions for a re-construction under the section, the Court will not, at the instance of a dissentient share-holder, order the liquidator to bring in and pass his accounts. *Re Imperial Mercantile Credit Association*, 41 L.J. Ch. 119. X

206. When any dispute so directed to be settled by arbitration has arisen, then unless both parties concur in the appointment of a single arbitrator, each party, on the request of the other party, shall by writing under his hand nominate and appoint an arbitrator to whom such dispute shall be referred.

Appointment of arbitrator when questions are to be determined by arbitration.

After any such appointment has been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation.

If for the space of fourteen days after any such dispute has arisen, and after a request in writing has been served by the one party on the other party to appoint an arbitrator, such last mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters in dispute; and in such case the award or determination of such single arbitrator shall be final.

(Notes).

General.

(1) Corresponding English Law.

S. 192 (6) of the English Companies (Consolidation) Act of 1908, provides for the determination of the price of the dissentient's interest by arbitration and runs thus.

For purposes of an arbitration under this section the provisions of the Companies Clauses Consolidation Act, 1845, or in the case of a winding up in Scotland, the Companies Clauses Consolidation (Scotland) Act, 1845, with respect to the settlement of disputes by arbitration, shall be incorporated with this Act; and in the construction of those provisions this Act shall be deemed to be the special Act, and "the Company" shall mean the transferor Company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or if there should be more than one liquidator, then of any two or more of the liquidators.

The procedure as to the appointment of arbitrators under the Companies Clauses Act is similar to that prescribed by this Act. The Act provides that when each party nominates an arbitrator they shall appoint an umpire, but if the refusal or neglect to appoint one, and one of the parties to the arbitration is a Railway Company, the Board of Trade appoints the umpire. The Act contains no provision in the case of other Companies. In such a case an umpire may be appointed by a Judge under the Common Law Procedure Act 1854, S. 12. See Buckley, 9th Ed., p. 438.

It has been held that the provisions of the Companies Clauses Act relating to arbitration do not apply where provision is made for arbitration in the articles of association. *De Rosaz v. Anglo-Italian Bank*, L.R., 4 Q.B., 462. Y

(2) Commission to examine witnesses.

For the purpose of an arbitration under this section the Court may, upon the application of the liquidator, order a commission to issue to examine witness abroad as to the value of the shares. See *Mysore West Gold Mining Co.*, 42 Ch. D. 535. Z

(3) Amount credited as paid up on consideration shares, no test of the price of dissentient's interest.

The value of the dissentient's interest is a question of fact. Neither the amount credited as paid up on the shares of the new company, distributed among the share-holders of the old company, nor the market value of the old company's shares is necessarily a test, though each may be an indication of the value. See *Re Mysore West Gold Mining Co.*, 42 Ch. D. 535. A

(4) Second reference to arbitration.

The rights of a dissentient share-holder whose matter has been referred to arbitration were not limited to a single reference to arbitration, and were not extinguished by the expiry, without an award being made, of the time fixed by such reference for making an award. In such a case, unless otherwise disentitled, he was entitled to a second reference. 7 B. 494. B

207. If, before the matters so referred are determined, any arbitrator appointed by either party die, or become incapable or refuse, or for seven days neglect, to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place; and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid.

208. Where more arbitrators than one have been appointed, they shall, before entering upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ.

If such umpire die, or refuse, or for seven days neglect, to act, they shall forthwith, after such death, refusal, or neglect, appoint another umpire in his place; and the decision of every such umpire, on the matters so referred to him, shall be final.

(Note).

N.B.—As to the appointment of an umpire under the English law when the arbitrators refuse or neglect to appoint one. See notes under S. 206, *supra*.

209. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath.

210. The costs of and attending every such arbitration to be determined by the arbitrators shall be in the discretion of the arbitrators or their umpire, as the case may be.

(Note).

General.

Costs of arbitration, where no definite sum was tendered to dissentient.

If the liquidator has not tendered a definite sum as the price of the dissentient shareholder's interest the arbitration proceedings will not be at the peril of the dissentient as to costs; the costs will be reserved.
Imperial Mercantile Credit Association, 12 Eq. 504.

211. On the application of either of the parties, the submission to any such arbitration may be filed in the Court, and an order of reference may be made thereon; and the provisions of the Code of Civil Procedure shall, so far as the same are applicable, apply to every such order and to all proceedings thereunder.

212. Where any Company is being wound up by the Court or subject to the supervision of the Court, any attachment, distress, or execution put in force, without the leave of the Court, against the estate or effects of the Company after the commencement of the winding-up shall be void ¹.

Nothing in this section applies to proceedings by the Government.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 211 of the English Companies (Consolidation) Act of 1908. That section, however, applies only to Companies registered in England or Ireland. The words "without leave of the Court" after the words "put in force" are not found in the English Act. The English Act contains the word "sequestration" between the words "attachment" and "distress," and after the words "shall be void" the English Act contains the words "to all intents." The words "Nothing.....Government" are not found in the English Act. D

(2) Effect of the section.

Under this section, an attachment, distress or execution put in force against the estate or effects of the Company after the commencement of the winding-up is not absolutely void but is subject to the discretionary power under S. 136, *supra*, to allow the attachment, etc., to proceed. This is clearly shown by the use of the words 'without the leave of the Court' in the section. The corresponding section of the English Act (S. 211) does not contain the words 'without leave of the Court'; still, in *Exhall Mining Co.*, 4 De J. and S. 377, it was held that the section must be read with Ss. 140 and 142 of the English Act corresponding to Ss. 184 and 186 of the Indian Act and in effect should be read as if "except by the leave of the Court" were added. See also *Vron Iron Colliery Co.*, and notes under S. 184, *supra*. E

(3) Restraint of proceedings against Company in voluntary liquidation.

Though the section does not apply to a Company in voluntary liquidation, still the Court may, on application made under S. 182, *supra*, restrain an execution put in force against the effects of a Company after the commencement of a voluntary winding-up. See *Westbury v. Twigg*, (1892), 1 Q.B. 77. F

1.—“Any attachment....shall be void.”

(1) Execution, when is ‘put in force.’

- (a) An execution to be void under the section must have been ‘put in force’ after the commencement of the winding-up. An execution is said to be ‘put in force’ only where it is perfected by seizure and attachment of the judgment-debtor’s property. The section therefore does not apply if execution has been perfected by seizure and attachment, though the property has not been sold, before the commencement of winding up. *Great Ship Co.*, Parry’s case, 4 De J. and S. 63 = 33 L.J. (Ch.) 245 = 3 N.R. 181 = 12 W.R. 139 = 10 Jur. (N. S.) 8. G

N.B.—But though an execution levied before commencement of winding up is not void under the section, a sale is a proceeding under S. 136, *supra*, and if the property has not been sold before winding up, the Court may, in its discretion, restrain the sale, but it will not generally do so in the absence of special circumstances. *Perkins Beach Co.*, 7 Ch. D. 371; *Great Ship Co.*, Parry’s case, 4 De J. and S. 63; *Withernsea Brickworks*, 17 Ch. Div. 337. H

- (b) If the execution is put in force after the presentation of the petition, but before the winding-up order is made, the section applies, and the execution is void unless ratified by the Court. *Traders North Staffordshire Co.*, *E.P. North Staffordshire Railway Co.*, 19 Eq. 60. I

N.B.—The same rules apply to a distress as to an execution. See notes to S. 134, *supra*.

N.B.—As to whether the section would apply to an execution on a judgment obtained against a Company in an action brought by the liquidators. See *E.P. Smith*, 3 Ch. 125. J

(2) Leave to proceed with suit, no authority for proceedings in execution.

A permission to proceed with a suit does not include a permission for proceedings in execution of the decree in the suit authorized. Separate leave must be obtained for levying execution. 16 B. 644. K

(3) Effect of winding-up on lien on Company’s goods.

- (a) A creditor having a general lien on the goods of a Company does not lose his lien by the winding up of the Company but may enforce it on goods remaining in his possession at the commencement of the winding-up. *Northfield Iron Co.*, 14 L.T. 695 = 1866 W.N. 253; *Pavy’s Patent Fabric Co.*, 1 C.D. 631. L

- (b) An agent was employed by a Company to take a shop and there sell the Company’s goods on commission. The agent had also to accept bills for the Company for such reasonable amount as was represented by the goods on his premises and if he had not, when the bills arrived at maturity, sufficient funds to meet them, the Company was to remit the amount to make up the deficiency. The agent accepted a bill, but before it arrived at maturity the Company was wound up; *held*, the agent had a lien on the goods in his possession for the amount of the bill. *Pavy’s Patent Fabric Co.*, 1 Ch. D. 631. M

- (c) The lien can be enforced also in goods coming into the possession of the creditor after the date of the petition, but before a winding-up order is made. *Llangennech Coal Co.*, 1887, W.N. 22. N

N.B.—The same rules apply where the winding up is voluntary. *North-west of Ireland Deep Sea Fishery Co.*, (1872), W.N. 11; *Pavy’s Patent Fabric Co.*, 1 Ch. D. 631. O

I.—“Any attachment....shall be void”—(Concluded).

- (d) The lien, cannot be enforced on goods coming into the possession of the creditor after the making of a winding-up order. *Wiltshire Iron Co. v. Greast Western Railway Co.*, L.R. 6 Q.B. 101, 776. P
- (e) Where a Railway Company had a general lien upon the waggons and goods of an Iron Company for moneys due to them, held an order for winding-up of the Iron Company put an end to the lien as regards property acquired by the Iron Company after the order. (*Ibid*). Q

(4) Solicitor's Lien on Company's books.

- (a) A Company's solicitor can acquire a lien on books or documents in his possession except the share register and Minute book, and any other documents on which directors cannot create a lien, which latter documents must be delivered to the liquidator subject to his lien, together with all documents which have come to his hands after the presentation of the petition. *Capital Fire Insurance Association*, 24 C.D. 408. R
- (b) But he can have no lien for costs incurred before incorporation of the Company. *Re Galland*, 31 Ch. D. 296. S

The section expressly provides that it does not affect proceedings by Government. But, even in the absence of any such provision, the result would have been the same for the rights of the Government are not affected unless expressly excluded. See notes under S. 200-A, *supra*. T

213. Every conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property, which would, if made or done by, or against any individual trader, be deemed, in the event of his insolvency, to have been made or done by way of undue or fraudulent preference of the creditors of such trader, shall, if made or done by or against any Company, be deemed, in the event of such Company being wound-up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such Company, and shall be invalid accordingly.

For the purposes of this section the making of an application for winding-up a Company shall, in the case of a Company being wound-up by the Court or subject to the supervision of the Court, and a resolution for winding-up the Company shall, in the case of a voluntary winding-up, be deemed to correspond with the act of insolvency in the case of an individual trader; and any conveyance or assignment made by any Company formed under this Act, of all its estate and effects to trustees for the benefit of all its creditors, shall be void.

(Notes).

General.

(1) Corresponding English Law.

This section corresponds to S. 210 of the English Companies (Consolidation) Act of 1908.

The English Act does not contain the words 'undue or' before the word 'fraudulent.' These words which were used in the former Acts have been omitted in the present English Act because it was held in *Stenotyper Co.* (1901), 1 Ch. 205, that the operation of S. 48 of the Bankruptcy Act (1883), which did not contain these words 'undue or' was not thereby extended. U

(2) Object of the section.

As the object of winding up is the *pari passu* distribution of the assets among the creditors of the company and as such object would be defeated by a preference shown to one creditor over others, the section has the effect of avoiding payments or transfers made by a creditor by way of preference, and of bringing the property or money into the assets of the company for distribution among creditors.

N.B.—A transaction which is void as a fraudulent preference of a creditor, is in the case of an individual trader an act of insolvency. But the Act does not render void every transaction which in the case of an individual would amount to act of insolvency. The section relates only to a case similar in all respect to that which arises in bankruptcy. See per Cotton L. J. in *Wilmott v. London Celluloid Co.*, 34 Ch. Div. 150; see, also, per Mellish L. J. in *Re Patent Fire Co.*, 6 Ch. App. 88. Y

(3) Insolvency law of fraudulent preference for the time being, to be applied.

(a) This section applies to a winding-up whether compulsory, voluntary or under supervision, the Law of Insolvency relating to fraudulent preference for the time being in force and not the law existing at the date of the Act. *Mason, Gallagher & Slater's case*, 30 W.R. 378; *Blackpool Motor Car Co.*, (1901), 1 Ch. 77, *Re Stenotyper* (1901), 1 Ch. 250. W

(b) The Law of Fraudulent Preference in this country is contained in S. 56 of the Presidency-Towns Insolvency Act (III of 1909) which applies to the towns of Calcutta, Madras, Bombay and Rangoon, and in S. 37 of the Provincial Insolvency Act (III of 1907) which applies to the rest of British India.

The English Law of Fraudulent Preference is contained S. 48 of the Bankruptcy Act 1883 (46 & 47 Vict. C. 52.) X

S. 37 of the Provincial Insolvency Act runs thus:—

(1) Every transfer of property or of any interest therein, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due to pay his own money in favour of any creditor preference over the other creditors, shall if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver and shall be annulled by the Court.

(2) This section shall not affect the rights of any person who in good faith and for valuable consideration has acquired a title through or under a creditor of the insolvent.

General—(Continued).

S. 56 of the Presidency-Towns Insolvency Act is similar in terms to S. 37 of the Provincial Insolvency Act, except that it does not contain the words 'or of any interest therein' after the words 'every transfer of property,' and instead of the words 'as against the receiver.....by the Court' it simply contains the words 'against the official assignee'.

Both these sections follow the language of S. 48 of the English Bankruptcy Act. The English Act, however, uses the words 'bankrupt' and 'bankruptcy' instead of the words 'insolvent' and 'insolvency' used in the Indian Acts, and instead of the words 'official receiver' or 'official assignee' the English Act uses the words 'trustee in bankruptcy.' The English Act contains the words 'or in trust for any creditor' after the words 'in favour of any creditor'. It is believed that the absence of these words in the Indian Acts in no way indicates that the Indian Law was intended to be different from the English Law in this respect, and that a transaction which would be a fraudulent preference, would not cease to be so, in the country merely because the payment is made to, or charge is created in, favour of a trustee for a creditor and not directly to the creditor.

N.B.—In determining the question whether a transaction amounts to a fraudulent preference the Courts will have regard simply to the definition in the Insolvency Acts, and though previous decisions may be useful as guides the standards laid down by them will not be substituted for that which is laid down in the Acts. *Re Wilcotton*, *E. P. Griffith* (1883), 23 Ch. 269. **Y**

(4) Essentials of fraudulent preference.

The conditions necessary to avoid a transaction as a fraudulent preference are :—

1. The Company must, at the date of the transaction, be unable to pay its debts as they become due from its own money.
2. The transaction must be in favour of a creditor.
3. The Company must have acted with a view of giving that creditor a preference over its other creditors.

The winding up of the company must have commenced within three months of the date of the transaction. *Mason, Gallagher & Slaters case*, 30 W.R. 378 ; *Sharp v. Jackson* (1899), A.C. 419 = 68 L.J. (Q. B.) 886 = 80 L.J. 841 = 6 Mans. 264. **Z**

(5) Act need not be done in contemplation of winding-up.

The effect of the first and the fourth conditions mentioned in the previous note is to render it unnecessary to inquire whether the Company acted in contemplation of winding up. This question is irrelevant, at any rate so far as its determination in the affirmative would be a condition precedent to the avoidance of a transaction as a fraudulent preference ; the test which these two conditions create is necessary and sufficient. *Halsbury's Laws of England*, Vol. II, p. 281. **A**

(6) Intention of the debtor.

- (a) The question whether there has been a fraudulent preference depends not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. It must be shown, not only that he has preferred a creditor, but that he has fraudulently done so. Per Lord Esher, M.R. in *New's Trustees v. Hunting* (1897), 2 Q.B. at p. 27. **B**

General—(Continued).

- (b) There must be evidence of fraud in respect of the payment and some motive must be shown to have existed in the debtor to make the preference. *E.P. Hitchcock*, 40 L.J.N.S. Chan. & Bank. **C**
- (c) The invalidity of the transaction arises from the fact that the debtor intends to act in fraud of the law, that is, to prevent the distribution of the debtor's property rateably among the creditors. *Bills v. Smith*, (1885), 34 L.J. (Q.B.) 68. **D**
- (d) If the act can be referred to any other motive than that of giving one creditor preference over another, the payment would not be fraudulent or void. *Per Bacon C.J. in E.P. Hitchcock*, 40 L.J.N.S. Chan. & Bank.; *E.P. Blackburn, Re Cheeseborough* (1871), L.R. 12 Eq. 358. **E**
- (e) The question whether the debtor's intention was to defeat the law and to prevent the distribution of the assets equally among the creditors is a question of fact, and is to be determined by reference to all the circumstances of the case. *Cook v. Rogers* (1831), Bing. 438; *Bills v. Smith* (1865), 34 L.J. (Q.B.) 68. **F**

(7) Preference must be the dominant view of the debtor.

- (a) To constitute fraudulent preference, the preferring of one creditor or particular creditors must be the dominant or substantial, though not necessarily the sole, view or motive of the debtor, i.e., of the company acting as a rule by its directors. *In Re Bird* (1883), 23 Ch. D. 695; *Sharp v. Jackson* (1899), A.C. 419; *Buckley's case* (1893), 2 Ch. 725; *Re Lake* (1901), 1 Q.B. 710. **G**
- (b) It need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result. *New Prance and Garrard's Trustee v. Hunting* (1897), 1 Q.B. 607, 617. **H**
- (c) Thus a preference was set aside as fraudulent though the ultimate or primary object of the debtor was to get the preferred creditors' patronage in the future. *In Re Bird* (1883) 23 Ch. D. 695; see, also, *New Prance and Garrard's Trustee v. Hunting* (1897), 1 Q.B. 607. **I**
- (d) When the substantial or dominant view is to give preference to a creditor over others, the transaction will be set aside though the motive of the debtor was what he considered right. *Re Fletcher, E. P. Suffolk*, 9 Mor. S. **J**

(8) Test of debtor's motive.

- (a) The proper test to apply to ascertain whether the dominant view in the debtor's mind was to prefer a creditor to other creditors, is, was the act done voluntarily? See *Thompson v. Freeman* (1786), 1 Term Rep. 155; *Hartshorn v. Slodden* (1801), 2 Bos. and P. 582; *E.P. Viney* (1897), 2 Q.B. 16; *E.P. Saffery* (1900), 2 Q.B. 325. **K**
- (b) A voluntary disposition is an act moving from the debtor. If the thing moves entirely from the debtor in the sense that it was his spontaneous act uninfluenced by any circumstances which tend to rebut the presumption that he made a distinction among his creditors, the transaction will be a fraudulent preference. On the other hand, if the proposal for payment or disposition of the property comes entirely from the creditor and is not collusive the transaction will stand. See *Halsbury's Laws of England*, Vol. II, p. 283, and the case there cited. **L**

General—(Continued).

(9) Preference must be in favour of a creditor.

- (a) The section refers only to preference of creditors. A transaction cannot be impeached as a fraudulent preference unless there is the relation of debtor and creditor between the company and the person preferred. See *Dovey v. Morgan* (1901), 2 K.B. 477. **M**
- (b) Thus, a preference in favour of a member as against other members is not a fraudulent preference within the meaning of this section. (*Ibid*). **N**
- (c) It is not enough that a creditor derives some advantage from the transaction. It is also necessary that the act must have been done with a view to favour him and not any one else. *Tomlins v. Saffery*, 3 A.C. 213. **O**
- (d) Where a director had guaranteed the payment of a debt due from the company to a third person, a security given by the company to the creditor not with a view to prefer him, but with the object of relieving the director, was held not to be a fraudulent preference. *Re Stenotyper* (1901), 1 Ch. 250. See also *Re Warren* (1900), 2 Q.B. 138. **P**
- (e) Similarly, where the object of a payment is to benefit the debtor himself, the fact that a creditor derives some benefit not shared by the other creditors will not make the transaction a fraudulent preference, though the other elements of fraudulent preference may be present. See *Tomlins v. Saffery*, 2 A.C. 213, 235. **Q**

(10) Who is a creditor.

- (a) Any person is a creditor who, at the date of the transaction impeached, is entitled, if winding up supervenes, to prove in the winding-up and to share in the distribution of the assets. *Ex parte Read, Re Paine* (1897), 1 Q. B. 122, followed in *Blackpool Motor Car Co.*, (1901), 1 Ch. 77; *Re Stenotyper Ltd.*, (1901), 1 Ch. 250; *Dovey v. Morgan*, (1901), 2 K.B. 477. **R**
- (b) Thus, a surety under a contingent liability is a creditor and a security given to him before he has been called upon to pay as surety may be a fraudulent preference. (*Ibid*). **S**

N.B.—But a payment of a secured debt to the creditor with a view to benefit the surety will not be a fraudulent preference. *Re Mills, E.P. Official receiver* (1888), 5 Morr. 55; *Re Warren, E.P., the trustee* (1900), 2 Q.B. 138. **T**

N. B.—A payment made in trust for a creditor must be considered as a payment to the creditor himself. **T**

(11) Preference must be against the whole body of creditors.

A transaction can be impeached as a fraudulent preference only for the benefit of the general body of creditors, but not for the benefit of a single creditor, or a class of creditors. See *Willmott v. London Celluloid Co.*, 31 Ch.D. 425=34 Ch. Div. 147, *E.P. Cooper*, 10 Ch. 510. **U**

(12) Preference by allowing set-off.

- (a) There may be a fraudulent preference not only by actual payment of a debt but also by allowing a set-off to a creditor. In applying the Insolvency Law of fraudulent preference to winding-up, the special legislation

General—(Continued).

applicable to limited companies and the members thereof must not be lost sight of, and though in the case of individuals a set-off of mutual debt is allowed after bankruptcy as well as before, a set-off of calls against debts is not allowed in the winding-up, and such a set-off allowed to a creditor within three months before the commencement of a winding up may be a fraudulent preference. *Washington Diamond Co.*, (1893), 3 Ch. 95. See also Kent's case (1888), 3 Ch. D. 259. Y

- (b) Thus an agreement by an insolvent Company on the eve of winding-up to accept payment of calls in advance on the shares of a director by setting off a debt due to him against his liability on the shares is void as a fraudulent preference, even though the Company has, under its articles, power to accept calls in advance. Kent's case, 39 Ch. D. 259. W

(13) Payment by directors to themselves.

- (a) Where a Company was in embarrassed circumstances and the directors of the Company having power to accept calls in advance paid the amount uncalled on their own shares and appropriated the money in payment of their fees, held the payment was not a *bona fide* payment, but a fraudulent preference and that the directors were still liable upon their shares, *In Re European Central Railway Co.*, Syke's case, 13 Eq. 255: *In Re Washington Diamond Mining Co.*, (1893), 3 Ch. 95 C.A. X

- (b) It is a fraudulent preference for directors who have obtained a loan from a bank on their personal guarantee, and some talk of a charge on uncalled capital "if required," to give a charge on such uncalled capital when not required by the Bank in order to prosecute themselves when called on to pay by taking a transfer of the charge. *Re London, Windsor & Greenwich Hotel*, 1 Meg. C.R. 242, cited in Manson P. Y

- (c) It is a fraudulent preference for directors knowing the Company to be insolvent, to make a call and then mortgage it to themselves to secure a debt due to them from the Company. *Gaslight Improvement Co.*, v. *Terrell*, 10 Eq. 168. Z

- (d) But it is not every payment made to a director by a Company in difficulties that will be fraudulent. Thus, where a Company whose articles allowed directors to participate in the profits of contracts with the Company, being under an onerous contract with a director, agreed with him to annul the contract and pay him compensation, the money to be applied in part in paying up his shares in full, his liability on the shares was thereby discharged. Adamson's case, 18 Eq. 670, cited in Buckley, 9th Ed. p. 785. A

- (e) A payment by the directors out of the Company's funds of a just debt due to themselves in the ordinary course of business is not a fraudulent preference. See *Willmott v. London Celluloid Co.*, 34 Ch. D. 147. B

(14) Transactions, not amounting to fraudulent preference—Payments made under pressure.

- (a) Payments made under pressure brought to bear on the Company by a creditor or a surety for a creditor, are not voluntary payments and do not amount to fraudulent preference. See *Van Casteel v. Booker*

General—(Continued).

(1848), 2 Exch. 691; *Strashan v. Barton* (1856), 11 Exch. 647; *Edwards v. Glynn* (1859), 28 L.J. (Q.B.) 350, 360; *Cash v. Crouch*, 11 East 255; 3 A. 530. C

- (b) The use of the word 'preference' implies that the debtor is in a position which enables him to exercise his free choice. *Sharp v. Jackson*, 1899, App. case 418. D

- (c) In order to prevent a transaction from amounting to fraudulent preference, the pressure must be a real *bona fide* pressure, operating on the mind of the debtor; the pressure must be incapable of resistance; the transaction must have been entered into by reason of it, and it must not have been fraudulent. See *E.P. Hall, Re Cooper*, 19 Ch. D. 580; *Graham v. Candy*, 3 F. and F. 206; *E.P. Wheatby, Re Grimes*, 45 L.T. 80; *Re Boyd, E. P. Boyd*, 6 Moor. 209; *Re Bell, E. P. Official Receiver* (1892), 10 Moor. 15; *Cook v. Pritchard* (1843), 6 Scott (N. R.) 84; *Brown v. Kempton*, 19 L.T. (C.P.) 169; *E.P. Reader, Re Wrigby*, L.R. 20 Eq. 763. See also 7 A. 340. E

- (d) A threat to bring an action against a Company on the eve of winding-up, is no pressure. See *E.P. Hall, Re Cooper*, 19 Ch. D. 580. See also 7 A. 340. F

- (e) On a debtor giving a hint to his creditor as to the real state of his affairs, the latter made a pressing demand for immediate payment of his debts which were accordingly paid. The payment was held to be a fraudulent preference. *Strachan v. Barton*, 11 Ex. 647. G

- (f) Moreover if the creditor is also a director of the debtor Company he cannot, while he remains in office, exercise such pressure as to prevent a payment from being a fraudulent preference. *Gaslight Improvement Co. v. Terrell*, 10 Eq. 168. H

(15) Pressure coupled with desire to prefer.

- (a) The existence of a desire to prefer will not make a payment made under genuine pressure a fraudulent preference. *Brown v. Kempton* (1850), 19 L.J. (C.P.) 169, *Graham v. Candy* (1862), 3 F. and F. 206. I

- (b) But, if the payment would not have been made but for the desire to prefer, the fact that the creditor pressed for payment would not prevent the payment from amounting to a fraudulent preference. *Re Bell, E.P. Official Receiver* (1892), 10 Morr, 15, 18. J

(16) Payment made under threat of legal proceedings.

Payment made under apprehension of legal proceedings is a payment made under pressure and is not void as a fraudulent preference. *Thompson v. Freeman*, 1 Term Rep. cited in *Sharp v. Jackson* 1899, A.C. 419. See also *E.P. Taylor*, 18 Q.B.D. 295. K

(17) Payment under sense of legal obligation.

A payment made under an honest though mistaken belief that the Company was under a legal obligation to make it is not a fraudulent preference. *Re Vautin, E.P. Saffery*, (1900), 2 Q.B. 325. See also Baldwin on Bankruptcy, 7th Ed., pp. 90—92. L

N.B.—But a mere sense of moral obligation, or motive of kindness or gratitude will not prevent a preference from being fraudulent. *Re Fletcher*,

General—(Continued).

E.P. Suffolk (1891), 9 Morr. 8; *Re Vingoe and Davies, E.P. Viney* (1894) 1 Mans. 416; *Re W. Blackburn & Co.*, Buckley's case (1899), 2 Ch. 752; *Re Jakes, E.P. Official Receiver* (1902), 2 Q.B. 58. M

(18) Reparation of past wrongs.

A payment made to make reparation for a wrong done as by restoring trust moneys misappropriated or to protect the party paying from exposure or to avoid the consequences of some penal act. *E.P. Stubbins, Re Wilkinson* (1881), 17 Ch. D. 58; *E.P. Dyer, Re Lake* (1901), 1 K.B. 710; *E.P. Taylor, E.P. Goldsmid* (1886), 18 Q.B.D. 293; *Sharp v. Jackson*, 1899 A.C. 419; *E.P. Ball, Re Hutchinson* (1887), 35 W.R. 264. N

(19) Transaction in ordinary course of business.

Transactions in the ordinary course of business, such as paying bills as they fall due or even before they fall due. *Re Clay, E.P. the trustee* (1895). 3 Mans. 81. See also the dictum of Lord Blackburn in *Tonkins v. Saffrey*, 3 A.C. at p. 235; *E.P. Viney* (1897), 2 Q.B. 16. O

N.B.—But it is otherwise if the bill be presented after maturity. *Re Eator & Co., Ex parte Viney*, (1897), 2 Q.B. 16. P

(20) Payment for the benefit of debtor.

Where the object of the payment is to benefit the person paying, and not his creditor, the transaction is not a fraudulent preference. *E.P. Boyle, Re Collett* (1871), 25 L.T. 550; *Re Wilkinson, E.P. Official Receiver*, (1884), 1 Morr. 65; *Re Glanville, E.P. the trustee* (1885), 2 Morr. 71; *E.P. Barnard, Re Arnott* (1889), 6 Morr. 215; *Re Clay & Sons, E.P. the trustee* (1895), 3 Mans. 31; *Re The Stenotypist Ltd.*, (1901), 1 Ch. 250; *Sharp v. Jackson* (1899), A.C. 419, 427. Q

(21) Security bona fide given.

(a) The issue of debentures to outsiders in satisfaction of existing debts is not necessarily a fraudulent preference. *Re Inns of Court Hotel Co.*, 6 Eq. 82, cited in Halsbury's Laws of England, Vol. V, p. 545. R

(b) Where a Company has purchased an insolvent business agreeing to indemnify the vendor against his debts, the issue of debentures in satisfaction thereof is not a fraudulent preference although the Company is wound up within three months after its incorporation. *Seligman v. Prince & Co.* (1895), 2 Ch. 617 C.A. S

(c) A security not tendered by the debtor but asked for by the creditor, not exhausting the property on which it was charged and given at a time when there was nothing to show that a winding-up was contemplated, was held not a fraudulent preference. *Patent File Co., E.P. Birmingham Banking Co.*, 6 Ch. 83. T

(d) Where the directors of a Company having power to borrow "upon mortgage or otherwise" issued debentures in payment for goods supplied to the Company, the transaction was in spite of the insolvency of the Company held good, as it was made not in contemplation of winding up but in order to avoid winding up. See Buckley, 9th Ed., p. 484. U

N.B.—But under the present law the question whether the debtor had, at the time of the transaction, the winding up in contemplation, would seem to be immaterial. See note *supra*. V

General—(Continued).

- (e) Where an advance is made upon a promise to give security, but the security is not given until within three months before liquidation, the transaction may be valid, but not if the execution of the security is purposely postponed until the eve of insolvency to prevent the destruction of the Company's credit. *Jackson v. Bassford* (1906), 2 Ch. 487, cited in *Buckley*, 9th Ed., p. 486. W

(22) Onus of proving fraud.

- (a) Where a transaction is impeached as a fraudulent preference, the onus of proof lies on the party impeaching the transaction. *E. P. Lancaster, Re Marsden* (1883), 25 Ch. D. 311, 319. *In Re Laurie, E. P. Green* (1898), 5 Mans 48=46 W.R. 491, dissenting from *E. P. Viney* (1897), 2 Q.B. 16. X
- (b) The onus is not discharged by showing that at the time of payment the debtor was to his own knowledge an insolvent. *Re Laurie, E. P. Green* (1898), 5 Mans 48, dissenting from *E. P. Viney* (1897), 2 Q.B. 16. Y

(23) Winding-up must follow within three months.

- (a) A transaction cannot be set aside as a fraudulent preference if the winding-up of the Company does not commence within three months from the date of the transaction. *Re Mason, Gallagher and Slater's case*, 30 W. R. 378. Z
- (b) When the directors of a Company in embarrassed circumstances re-pay themselves, out of the Company's money, advances made by them to the Company, but the winding-up petition is presented more than three months after the payment, the payment is not void as a fraudulent preference. (*Ibid.*) A

(24) Period of three months, how calculated.

- (a) In calculating the period of three months the date of the presentation of the petition or passing of the resolution should be omitted. See *Re Harvey, E.P. Harvey & Co.*, (1890), 7 Morr. 138; *Re Dawes E.P. Official Receiver* (1897), 4 Mans. 117. B

N.B.—This section does not apply to a payment made after the commencement of winding-up. See *E.P. Palmer, Re Badham* (1893), 10 Morr. 252. C

(25) Misfeasance proceedings against officers fraudulently preferred.

Where a payment to a director or other officer is void as a fraudulent preference, misfeasance proceedings may be taken to recover the amount paid. See *Washington Diamond Mining Co.*, (1893), 3 Ch. 95. D

(26) Action by debenture-holders to set aside a fraudulent preference.

An action by debenture-holders to set aside a transaction as a fraudulent preference of directors was dismissed on the ground that the debenture-holders' claim was that the goods belonged to them and not to the Company and that there could be no fraudulent preference by delivery of goods that did not belong to the Company. *Willmott v. London Celluloid Co.*, 31 Ch. D. 425=34 Ch. D. 147. E

General—(Concluded).

(27) Distribution of assets among creditors in the absence of fraudulent preference.

Where under a deed of inspectorship executed before a Company went into liquidation, a dividend was paid to some only of the creditors, and there was no question of fraudulent preference, those who did not receive the dividend were not given in the distribution of the assets in winding-up any priority over those who received it. *E.P. Ashbury*, 5 Eq. 223. F

(28) Rights of *bona fide* purchaser for value.

Though a transaction may be void as a fraudulent preference as between a creditor and the Company, it may be upheld by a person who in good faith and for valuable consideration has acquired a title through or under the creditor. See S. 37 (2) of the Provincial Insolvency Act (III of 1907) and S. 56 (2) of the Presidency Towns Insolvency Act (III of 1909). G

(29) Proof of good faith and consideration—*Onus*.

Where a person claims the rights of a *bona fide* purchaser for value the burden of proving *bona fides* and payment of consideration lies upon him. See *E. P. Case* (1896), 35 L.T. 531. H

(30) Good faith—Definition.

A thing shall be deemed to be done in 'good faith' when it is in fact done honestly, whether it is done negligently or not. See S. 3 (20) of the General Clauses Act (X of 1897). I

214 1. Where, in the course of the winding-up of any

Power of Court to assess damages against delinquent directors and officers.

Company under this Act, it appears that any past or present director, manager, official, or other liquidator, or any officer, of such Company², has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the Company, or been guilty of any misfeasance or breach of trust in relation to the Company³, the Court may, on the application of any liquidator or of any creditor or contributory of the Company⁴, notwithstanding that the offence is one for which the offender is criminally responsible, examine⁵ into the conduct of such director, manager, or other officer, and compel him to re-pay⁶ any moneys⁷ so misapplied or retained, or for which such officer has become liable or accountable, together with interest⁸ after such rate as the Court thinks just, or to contribute such sums of money to the assets of the Company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

Explanation I.—The banker⁹ of a Company is not, as such, an officer within the meaning of this section.

*Explanation II*¹⁰.—Proceedings cannot be taken under this section against the representatives of a deceased officer.

(Notes).

Corresponding English Law.

POWER OF COURT TO ASSESS DAMAGES AGAINST DELINQUENT DIRECTORS, &C.

Where in the course of winding-up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to re-pay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just. [S. 215, para 1, The Companies Consolidation Act, 1906]. J

N.B.—S. 165 of the Companies Act, 1862 corresponds to S. 214 of the Indian Companies Act. 19 C. 688 (695). K

I.—“Section 214.”

(1) Section, scope of—Section gives a summary remedy.

- (a) This section gives no new rights but simply provides a summary mode of enforcing rights which must otherwise have been enforced by suit. It is not all rights that can be enforced under the section but only those specially indicated. 5 Bom. L.R. 633. L
- (b) This section does not create any new liability on the persons named, but only provides a method of enforcing rights which might have been enforced by an action before the winding-up, and which even after the winding up may, if more convenient, be so enforced. *Coventry and Dixon's Case*, (1880), Ch. D. 660, 670. M
- (c) The section authorises the recovery at the instance of the liquidator, creditor, or a contributory of the Company in liquidation first of moneys for which the defendant has become accountable to the company and secondly the pecuniary loss sustained by the Company through the misfeasance or breach of duty of the defendant. 5 Bom. L.R. 633. N
- (d) In reference to S. 165 of the English Companies Act, 1862 which is in the same terms with S. 214, Lord Watson has said: “I think it is material to attend to the specific nature of the claim authorised by the section.” It authorizes the recovery at the instance of the liquidator, creditor or a contributory of the Company in liquidation, first of monies for which the defendant has become accountable to the Company and secondly the pecuniary loss sustained by the Company through the misfeasance or breach of duty of the defendant.” 5 Bom. L.R. 633 (635). O
- (e) This section gives a summary remedy against such directors or other officers guilty of misfeasance and does not enable the Court to pass an order against all directors *en masse*. 29 C. 688. P

1.—“Section 214”—(Continued).

(2) Section, power given by the, when to be exercised.

- (a) The summary power given by this section is not to be exercised only in cases where the charge against the director or officer is clearly and distinctly made out and there is no question of law to be determined. *Per Giffard L.J. in Stringer's case*, 4 Ch. 475 (493), *Ranee's case*, 6 Ch. 104, 114, 120. Q
- (b) The Court is empowered to examine into the conduct. (*Ibid*). R
- (c) This section “was introduced in order that by proceedings under the Act, without any double process, or double set of proceedings, complete justice might be done between the parties, and a complete winding up effected; the instances are rare in which the jurisdiction ought not to be exercised.” (*Ibid*). S

(3) Section, Jurisdiction under the, discretionary.

- (a) The jurisdiction under the section is discretionary. *Sunlight Incandescent*, 16 Times L.R. 588. T
- (b) So where all the creditors are satisfied, and a large majority of contributories are prepared to waive any claim against directors for an alleged secret profit, the Court may in its discretion, refuse relief under this section. (*Ibid*). U

(4) Section, applicability of.

- (a) To say that the section applies to any misconduct by an officer as such, for which he might have been sued apart from the section is too wide. *Kingston Cotton Mill Co.*, (No. 2), 1896, 1 Ch. 331. Y
- (b) The section includes all cases in which an officer has been guilty of a breach of duty as officer, which has caused pecuniary loss to the company by misapplication of its assets and for which he might have been sued. (*Ibid*). W
- (c) This section does not give the Court power to fine a director for misconduct. *Coventry and Dixon's case*, (1880), Ch. D. 660, 670. X

(5) Section, applicability of breach of duty resulting in recovery of nominal damages.

The section does not apply to cases where an action would lie for breach of duty resulting in the recovery of nominal damages. There is no duty owing to the creditor or contributory for breach of which he could maintain an action: his right is to have the assets of the company recouped any loss which they have sustained by reasons of a misfeasance or breach of duty. *Buckley on Companies*, 9th Ed., p. 495. Y

(6) Section when a claim under this, can be sustained.

To sustain a claim under this section three things must be shown by the applicant.

- (i) misfeasance or breach of trust ;
- (ii) loss arising therefrom ;
- (iii) an interest in the result of the application. *Bentinck v. Fenn*, 12 A.C. 652, 662; 664, 669. Z

1.—“Section 214”—(Concluded).**(7) Section, persons within the.**

- (i) Past or present directors.
- (ii) Managers.
- (iii) Official or other liquidator.
- (iv) Any officer of the Company.

A

(See section).

(8) Notice when to be given.

See 18 A. 215.

B**(9) S. 12, Limitation Act.**

S. 12 Limitation Act is not applicable to a person appealing under S. 214 of Act VI of 1882 (Indian Companies). 18 A. 215 = 16 A.W.N. 3J. See also 4 Ind. Cas. 872 = 19 M.L.J. 511.

C**(10) Proceedings under S. 214.**

(a) Art. 36, Limitation Act is inapplicable to an application, by an official liquidator, under S. 214, Indian Companies Act, to compel the directors to repay money misapplied—the article being applicable only to suits and not to applications. 19 M. 149.

D

(b) That article has no application to the special proceeding provided for by S. 214. 18 A. 12 = 15 A.W.N. 136.

E**2.—“Officer of such company.”****(1) Officer.**

The term—is not to be confined to a person who has in some way or other control over the assets of the company, (1895), 2 Ch. 170 (172).

F**(2) Banker.**

The bankers of a company are not officers of the company so as to be amenable to the jurisdiction given by this section. *Imperial Land Co., of Marseilles, In re National Bank*, 10 Eq. 298.

G**(3) Trustees.**

Nor *semble* are trustees for debenture-holders. *Astley v. New Tivoli*, (1899), 1 Ch. at 154.

H

But a trustee in whose name a certain proportion of the premiums on policies ought to have been invested is such an officer. *British Guardian Co.*, 1890, W.N. 63.

I**(4) Executors of deceased officer.**

The executors of a deceased officer are not officers, and are therefore not liable to misfeasance proceedings. *Re British Guardian Life Assurance Co.*, (1880) 14 Ch. D. 335.

J

N.B.—But the survivors of several directors are liable. (*Ibid.*) *Fellom's Executor's case*, (1865), L.R. 1 Eq. 219.

K**(5) Officer of the Company.**

(a) Secretary is an officer of the Company. *Re Mutual Aid Permanent Benefit Society*; *Ex parte James*, 1883, 49 L.T. 530.

L

(b) So also an auditor. *Re Kingston Cotton Mill Co.*, (1896), 1 Ch. 6 C. A.; 18 A. 12 = 15 A.W.N. 136.

M

2.—“Officer of such company”—(Concluded).

An auditor of a company to which Act No. VI of 1882 applies, who is duly appointed by a general meeting of the company and not casually called in as occasion may require, is an officer of the company within the meaning of S. 214 of the above-mentioned Act. *In re (the London and General Bank Ltd., (The Accountant, May 4th, 1895) referred to.* 18 A. 12=15 A.W.N. 136. N

It appears, however, that Mr. Justice Vaughan Williams in December last held that an auditor was an officer of a Company within the meaning of section of the English Statute; and since then one division of the Court of Appeal in England has held on appeal in that case, that the auditor was an officer of the Company within the meaning of S. 10 of 53 and 54 Victoria, Chapter 62. The last decision is very curtly reported in the English Weekly Notes for 1895, p. 74, 18 A. 12. O

He was not a servant of the directors, but an officer of the Company, and an officer who, although he had nothing to do with the management of the company, had most important duties to perform as a paid officer of the Company. 18 A. 12 (15). P

N.B.—A person casually employed by the directors to prepare a balance sheet is not an officer of the Company. *Re Western Counties Steam Bakeries & Milling Co.*, 1897, 1 Ch. 617, C.A. (Company). Q

(c) Solicitor.—The solicitor stands in a position similar to that of the banker; he is not within the section. *Carter's case*, 31 Ch. D. 496. R

A solicitor, ordinarily speaking, would not be an officer of the Company within the meaning of that section, but he might, by the position which he agreed to take up with regard to the Company, become an officer of the company. 18 A. 12 (14). S

He may come under the section, under special circumstances, e.g., that he is permanently employed by a solicitor at a fixed salary and is also financial manager. *Re Liberators*, 71 L.T. 406. T

(d) Persons whose duty it is to invest monies of the Company and hold the investments are officers of the Company. *Re British Guardian Life Assurance Co.*, (1880) W.N. 68. U

N.B.—Trustee of debenture trust deed is not an officer of the company. *Asteley v. Mu Tivoli Ltd.*, (1899), 1 Ch. 151 (154). Y

See also a banker, *Re Imperial Land Co., of Marseilles*, *Re National Bank*, (1870), L.R. Eq. 298. W

3.—“Has misapplied....any misfeasance or breach of trust in relation to the company.”

(1) Misfeasance, etc., in respect of which applications may be made.

(a) The section in terms applies whenever a director, &c., “has misapplied, or retained, or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company.” The section does not create any new liability, or any new right, but provides a summary mode of enforcing rights otherwise enforceable by action. *Cavendish Bentinck v. Fern*, 12 A.C. 652. X

3.—“Has misapplied....any misfeasance or breach of trust in relation to the company”—(Continued).

- (b) This section gives a summary remedy only against such Director or Directors or other officer as have been personally guilty of some act of misfeasance, and does not give the Court power to make an order against the Directors *en masse* without any finding whether they have all or whether any or which of them have been personally guilty of any of the acts which under s. 214 enable the Court to exercise a summary power. 29 C. 688 (694). Y

(2) Misfeasance proceedings, only a summary method.

It only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary jurisdiction of the Court. *Coventry & Dixon's Case*, (1880), 14 Ch. D. 660, 670, C.A. Z

Misfeasance, meaning of.

- (a) “Misfeasance means some act in the nature of a breach of trust, and resulting in actual loss to the Company. *Cavendish Bentinck v. Fern*, 12 A.C. 652, 11 B. 133 (135) Stephen's Commentaries, 3rd Ed. Vol. III, p. 452. A

- (b) It does not mean misfeasance in the abstract, *e.g.*, acting as director without qualification shares. (*Ibid*). B

Where, therefore, persons had acted as directors, and the holding of the qualification shares (which they never took) was a condition precedent to eligibility, so that they never were directors at all, and never came under contract to take the shares, they had been guilty of a misfeasance in the abstract by acting when they knew or ought to have known that they were not duly elected; but to render them liable, some damage to the Company must have been shown they could not be fined in the nominal amount of the shares which; they ought to have had. See *Buckley on Companies*, 9th Ed., p. 495. C

- (c) & (d) The word “misfeasance” does not cover every misconduct by an officer of the Company as such, for which he might have been sued apart from the section; for the section only refers to the recovery of assets.

It “means misfeasance in the nature of a breach of trust: that is to say, that it refers to something which the Officer has done wrongly by misapplying or retaining in his own hands any money of the company, or by which the Company's property has been wasted or the company's credit improperly pledged; it must be something resulting in actual loss to the company,” *Coventry & Dixon's case*, (1880), 14 Ch. D. 660, 670. D

- (e) Elsewhere it has been defined as consisting of any breach of duty of an officer, in his capacity as officer, which results in an improper application of the assets or property of the company, including property which ought to have come to the company, but has been intercepted, for “money had and received for the use of the company” may in equity, without impropriety, be called money of the company. *Kingston Cotton Mill Co.*, No. 2 (1896) 2 Ch. at p. 288; *Sale Hotel and & Botanical Gardens*, (1898), 78 L.T. 368. E

- (f) Misfeasance of a director constitutes a breach of trust. It is more than mere negligence, which consists in the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do. 9 B. 373. (396). F

3.—“Has misapplied....any misfeasance or breach of trust in relation to the company”—(Continued).

Negligence depends upon the public duty which is incumbent upon every one to exercise due care in his daily life; but a breach of trust depends upon the neglect of some special duty undertaken in regard to some specified person or body of persons. In the former case the liability dies with the person; in the latter it follows his estate after his death. 9 B. 373 (399). G

- (g) A mere breach of duty for which the company might have recovered nominal damages is not within the section; for there is no duty or breach of duty to the company in respect of which a creditor or contributory can maintain an action; his right is, where, owing to misfeasance or breach of duty, the funds of the company have been diminished, to have those funds made good, and the assets of the company recouped for the loss sustained. *Cavendish Bentinck v. Fenn*, 12 I.C. 652, *London & General Bank*, (2) (1895), 2 Ch. 673. H

The section expressly provides for its application, although the offence is a Criminal one. See *Emden's Winding-up of Companies*, 8th Ed., p. 249. I

(4) What amounts to misfeasance.

- (a) A misfeasance summons, however, cannot be sustained even where nominal damages could be recovered in an action for the breach of duty alleged, unless the breach has resulted in loss to the company's funds and assets, and the applicant has a direct pecuniary interest in the success of the application. *Cavendish Bentinck v. Fenn*, (1887), 12 App. Cas. 652. J

- (b) Nor can it be sustained in the case of non-feasance, even where it is a breach of trust, unless loss to the assets has resulted therefrom. *Bute's (Marquis) Case*, (1892), 2 Ch. 100; although the Court may order the respondents to a misfeasance summons, even where the liquidator establishes no money claim against them, to pay the costs. *Re Ireland & Co.*, (1905), 1 L.R. 133, C.A. K

- (c) The application need not be based on fraud. *Salé Hotel Co.*, 78 L.T. 368. K 1

- (d) It is immaterial that the offence is one for which the offender may be criminally responsible. Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), S. 215 (2) (Companies) Winding-up Act) 1890 (53 and 54 Vict. C. 63), S. 10 (2). L

- (e) A transaction cannot be impeached in misfeasance proceedings where the object is to obtain an undue advantage against the Company, but to obtain an undue advantage in the stock market as against persons likely to purchase shares of the Company there. *Re Ambrose Lake Tin & Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390. M

- (f) Where the Company has been dissolved, the remedy by misfeasance application no longer exists. *Pulsford v. Devenish*, (1903), 2 Ch. D. 625, 633. N

(5) Misfeasance—Onus.

The onus of proving misfeasance is on the applicant so that even if the misfeasance alleged be non-disclosure, the applicant must prove the non-disclosure. *Bentinck v. Fenn*, 12 A.C. 652. O

3.—“Has misapplied....any misfeasance or breach of trust
in relation to the company”—(Continued).

A.—Misfeasance by Directors.

B.—Misfeasance by Secretary.

C.—Misfeasance by Manager.

D.—Misfeasance by Liquidator.

E.—Misfeasance by Auditor.

A.—Misfeasance by Directors.

(1) Whether Directors are trustees or mere agents.

- (a) “All the authorities beginning with Lord Hardwicke a hundred years ago (2 Atkins, 400), who says that the Directors in accepting their trust are within the case of common trustees, down to Bacon V.C., a few months ago (*London Financial Association v. Kelk*, 26 Ch. Div. at p. 143), who says they are not improperly called trustees, agree in assigning them the former position.” 9 B. 373 (393). **P**
- (b) The question was fully discussed in *Flitcroft's Case*, 21 Ch. Div. 519 (*Ibid*). **P-1**
- (c) Bacon, V.C., there says: “They have interests of their own, but they are trustees of the money which may be collected by subscriptions and of all the property that may be acquired.” Jessell, M.R., says in the same case on appeal, “they are *quasi-trustees* for the company.” 9 B. 373 (394). **Q**
- (d) Cotton, L.J., says: “The directors are in the position of trustees.” (*Ibid*). **R**
- (e) In another case Jessell, M.R., calls them “commercial trustees”—*Smith v. Anderson*, 15 Ch. Div. 26. (*Ibid*). **S**
- (f) Lord Romilly says (L.R. Eq., p. 11): “Directors are responsible as trustees for the employment of funds. In S. 88 of the Indian Trusts Act, No. II of 1882, directors are placed in a list of persons bound in a fiduciary character to protect the interests of others.” (*Ibid*). **T**
- (g) And the Specific Relief Act, I of 1877, in its interpretation clause (S. 3), says: “Trustee includes every person holding expressly, by implication or constructively, a fiduciary character.” (*Ibid*). **U**
- (h) The conclusion is that, (a) although the directors are not trustees in every sense of the term, they stand in a fiduciary relation towards their shareholders with respect to the funds and the business placed in their charge. (b) It follows that they are liable to be sued for a breach of trust, in case they have not dealt with the property and watched over the business as carefully as a man of ordinary prudence would deal with such property and watch over such business if they were his own.” (*Ibid*). **Y**
- (i) The question of liability, therefore, in this case, may be put in this way. Did the defendant directors as commercial men, managing a trading company, in conjunction with the agent, for the benefit of themselves and all the other shareholders in it, use fair and reasonable diligence in the management of the Company's affairs? In deciding such a question the Court has to hold the balance fairly, in order to avoid alternative dangers. On the one hand the interests of shareholders and of creditors must be safeguarded against negligence and misconduct; on the other hand, the duties of directors must not be made

3.—“Has misapplied...any misfeasance or breach of trust in relation to the company?”—(Continued).

A.—Misfeasance by Directors.—(Continued).

so onerous as to cause every honest and prudent man to shrink from accepting such a post. If directors were to be made pecuniarily liable for every slip and error, all prudent men would refuse to act, and companies would be at the mercy of fools or rogues. 9 B. 373 (394). W

- (j) In laying down any general rule for India as to the duties which ought properly to be imposed on the directors of joint-stock companies, which are an institution of purely English origin, the Court should be guided by a consideration of English commercial rules and by the current of English decisions so far as they can be suitably applied to a people whose trade is of comparatively recent growth. But the importance of association in commercial matters is now fully realized by the natives of India, and the advantages of a limited liability are not less recognized. 9 B. 373 (395). X

- (k) In the interests of the public, therefore, whether share-holders or creditors, it is necessary to lay down rules to ensure as equitable a management of a Company's concerns, from those who are entrusted with its direction, as can now be obtained from the members of an ordinary partnership. (*Ibid*). Y

- (l) It was argued that the pecuniary liability of directors ought not to extend to mere consequences of negligence where they have not themselves benefited improperly. This contention so broadly stated, cannot be accepted. 9 B. 373 (395). Z

- (m) A man, of course, is not forced to place himself in a fiduciary position. But if he does undertake the affairs of others he must exercise ordinary prudence and vigilance. (*Ibid*). A

- (n) It is an established rule that trustees cannot delegate their office, and, if they do thus divest themselves of their trust, they are held liable for any breach of trust committed by the person to whom the office has been entrusted. (*Ibid*). B

- (o) “Trustees,” says Lord Langdale (*Turner v. Corney*, 5 Beav. 517), “who take on themselves the management of property for the benefit of others, have no right to shift their duties on other persons, and, if they employ an agent, they remain subject to responsibility towards their ‘*cestui que trust*’ for whom they have undertaken the duty.” There are, of course, exceptions to this general rule, as, for instance, when the employment of an intermediary party, such as a shareholder, is absolutely necessary (*Ex parte Belchin*, Amb. 212; *Speight v. Gaunt*, 9 App. Cas. 1, cited in 9 B. 373 (396). C

- (p) A director of a company was present, and voted at a meeting of directors where a payment was sanctioned for preliminary expenses. He made no inquiry as to what the payment was for. It was, in fact for expenses incurred by fraudulently raising the price of company's shares in the market. The director was held liable to re-pay the amount so paid, as, although a director's liability is not governed by the strict rules applied in the case of trustees, he must show reasonable diligence. The Lords-Justices in this case confirmed Sir George Jessel, and held that a director, even though he be acquitted of any-

3.—“Has misapplied....any misfeasance or breach of trust in relation to the company”—(Continued).

A.—Misfeasance by Directors.—(Continued).

- thing like dishonesty, still he must be held liable, if he fails to show reasonable diligence in calling for accounts and explanation. *Marzetti's case*, 28 W.R. 541. Cited in 9 B. 373 (396). **D**
- (g) *Browne's case*, 8 Eq. 381 was cited with approval where similar doctrine was laid down by James, L.J. (*Ibid*). **E**
- (r) In an application under S. 165 of the English Companies Act, 1862 (which corresponds with S. 214 of the Indian Companies Act, 1882, it was held that the relationship of trustee and *cestui que trust* subsists between the directors of Joint Stock Companies and the shareholders; *In re Exchange Banking Company*, 21 Ch. D. 519; also *in re National Funds Assurance Company*, 10 Ch. D. 118, and *in re Oxford Benefit Building and Investment Society*, 35 Ch. D. 502, Cited in 19 M. 149 (150). **F**
- (s) In 9 Bom. 373, it was held that the misfeasance of a director was a breach of trust. 19 M. 149 (150). **G**
- (t) In *In re Oxford Benefit Building and Investment Society*, 35 Ch. D. 502 (509) Kay, J., says: “It is settled by authorities which I cannot dispute, that (1) directors are quasi-trustees of the Capital Company, (2) directors who improperly pay dividends out of capital are liable to re-pay such dividends personally upon the company being wound up * * * (3) such an act is a breach of trust and the remedy is not barred by the Statute of Limitation. 18 B. 119 (123). **H**
- (u) In *In re Sharpe*; *In re Bennett*; *Masonic and General Life Assurance Company v. Sharp*, (1892), 1 Ch. 154 (167), Lindley, L.J., says: “A director of a Company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself, and the conflict between his interest and his duty when he has misapplied the company's money prevents the statute of limitations from applying to an action brought against him by the company in order to recover such money.” 18 B. 119 (123). **I**
- (v) And I take it from Buckley in his work on companies, pp. 495 to 497 (6th Ed.), that directors are undoubtedly trustees of the powers entrusted to them as between themselves and the share-holders, for the assets of the company are entrusted to them to be applied for certain defined objects, and they are responsible as for a breach of trust if they apply them to other objects. (*Ibid*). **J**
- (w) The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the

3.—“*Has misapplied....any misfeasance or breach of trust in relation to the company*”—(Continued.)

A.—Misfeasance by Directors.—(Continued).

validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.” The same doctrine is discussed in the cases of *Erlanger v. New Sombbrero Phosphate Co.*, 3 Ap. ca. 1279, and *in re Mammoth Copperopolis of Utah*, 50 L.J. (Ch) 11; 18 Bom. 119 (124). K

(x) As soon as the conclusion is arrived at that the company's money has been supplied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to re-place the money, however honestly they may have acted.” Lord Justice Lindley *In re Sharpe*, (1892), 1 Ch. at p. 165. Cited in 18 B. 119 (129). L

(y) The payment of dividends out of capital was held to be *ultra vires*, *Sir G. Jessel in re National Fund Association*, 10 Ch. D. 128; 18 B. 119 (129). M

(z) Payment of dividend out of capital being *ultra vires*, an action may no doubt be brought by one share-holder suing on behalf of himself and all others to compel payment by the directors of the amount misapplied, but a share-holder who received the dividend with knowledge and retains it cannot maintain such an action. *Towers v. African Tug*, (1904), 1 Ch. 558. N

(2) Whether any, and, if any, what, errors of directors can be excused by the acquiescence of the share-holders ?

(a) The question—is discussed at great length in *Ashbury Carriage Company v. Riche*, 7 H. L. 653; 9 B. 373 (397). O

(b) A distinction was drawn between acts *ultra vires*, not only of the directors of the company, but of the company itself and acts which are *extra vires* the directors, but *intra vires* the company. 9 B. 373 (397). P

(c) The first cannot be ratified, because they are beyond the powers given by law, either as being against public policy or prohibited by statute, or because their admission would be just to the public, or because they are inconsistent with, or foreign to, the object expressed in the memorandum of association. (*Ibid*). Q

(d) The second class applies to cases where the directors have gone beyond the powers entrusted to them; but still the acts are not beyond the objects of the memorandum of association, and may be validated by the sanction of the company. This second class is capable of rectification. (*Ibid*). R

(3) Joint-Stock Company—Directors—Shares—Purchase *ultra vires*—Trustee Shareholder—Acquiescence.

(a) The purchase by the Directors of a Joint-Stock Company on behalf of the company, of shares in other Joint Stock Companies, unless expressly authorised by the memorandum of association, is *ultra vires*. 4 B.H.C.R. 185. S

3.—“*Has misapplied....any misfeasance or breach of trust in relation to the company*”—(Continued).

A.—Misfeasance by Directors—(Continued).

- (b) A joint stock company, even though it be empowered by its memorandum of association to deal in the shares of other companies, is not thereby empowered to deal in its own shares, and a purchase by the directors of the company of its own shares on behalf of the company is, therefore under such circumstances *ultra vires*. (*Ibid.*) T
- (c) A share-holder in a joint stock company can maintain an action against the directors of such company to compel them to restore to the company funds of the company that have by them been employed in transactions that the directors have no authority to enter into, without making the company a party to the suit. (*Ibid.*) U
- (d) Where a share-holder purchased shares in a joint stock company knowing at the time that similar companies were in the habit of dealing in their own shares and those of other companies were in the habit of dealing in their own shares and those of other companies, and believing that the company in question adopted the same practice, but made no enquiry to ascertain whether or not such was the case, nor made any objection to such dealings of the company until it was discovered they had resulted in loss, it was held that he had by his own conduct lost his right to hold the directors personally liable in respect of such dealing, and the result was held to be the same whether the said share-holder was beneficially entitled to his shares, or merely a trustee of them for others. (*Ibid.*) Y
- (e) In *Morgan's* case (*supra*), which was a purchase of shares from shareholders with a view to raising funds to meet the pressing wants of the creditors, Lord Cottenham held that there could be no valid sale of shares to the company except under the special circumstances in which the company had express authority to purchase, and that the sales in question not having taken place under those special circumstances, were consequently invalid. 4 B.H.C.R. 185 (194). W
- (f) In the case of *Evans v. Coventry*, (*ubi supra*), before Vice-Chancellor Kindersley, which was a suit by certain persons assured in the General Life Assurance Company to compel the directors to restore the capital expended in the purchase of shares of the company, the Vice-Chancellor seems to have assumed that, as there was no express authority to the directors to buy shares for the company, the purchase was *ultra vires*; and then proceeds to give other reasons having special reference to the relation of trustee and *cestui que trust* which he had previously decided was created between the directors and the insured. 4 B.H.C.R. 185 (195). X
- (g) In *Spackman's* case, before Lord Westbury, and in *Stanhope's* Case, before Lord Cranworth, it was assumed that the sales to the directors, unless they could be regarded as effected under the power to compromise, were *ultra vires* and the important question was whether the company was estopped by lapse of time and by other circumstances from disputing the validity of the sales. (*Ibid.*) Y

(4) Misfeasance summons against directors.

- (a) A misfeasance summons may be brought against directors where they have received money from promoters in pursuance of an agreement to

3.—“*Has misapplied....any misfeasance or breach of trust in relation to the company*”—(Continued).

A.—Misfeasance by Directors—(Continued).

indemnify them against loss on qualification shares. *Archer's case*, (1892), 1 Ch. 322, C.A. Z

(b) or where they have received money from vendor to the company to pay for qualification shares. *Hay's case*, (1875), 10 Ch. App. 593. A

(c) They are also liable for presents or remuneration improperly received out of the assets of the Company or for shares purchased from promoters at less than par value. *Re Newman (George) & Co* (1895), 1 Ch. 674, C.A., *Weston's case*, (1879) 10 Ch. D. 579 C.A. B

(d) “As soon as the conclusion is arrived that the Company's money has been applied by the Directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted.” *Per Lindley, L.J. in Masonic Co. v. Sharpe*, 1892, 1 Ch. 166. C

(5) Directors' Misfeasance generally.

(a) A director who knowingly procures shares to be allotted to infants is liable for the amount due on their shares, *Ex p. Wilson*, 8 Ch. 45. D

(b) A director *de facto* but not *de jure* who receives directors' fees, for the amount of fees. *Public supply Ass.* (1880) W.N. 106. E

(c) Directors for the amount of fees they pay themselves, after petition presented, *Hunt's case*, 16 W.R. 472; or for the amount of fees paid when under the terms of the articles no fees had been earned. *Oxford Permanent Benefit*, B. S. 35 C.D. 502. F

(d) Directors (i) for the company's money fraudulently spent in raising the price of the company's shares in the market, *Marzett's case*, 28 W. R. 541. G

(ii) for unauthorized investment in shares of a company trading for purposes entirely foreign to the objects of the company, *Lands Allotment Co.*, (1894) 1 Ch. 617; unless, perhaps, by way of compromise for a debt, (*Ibid.*) H

(iii) for fraudulent preference. See *Liverpool and London Insur. Com.* 46 L.T. 54. I

(iv) for money paid to bankers to induce them to open an account, *Re Imperial Land Co. of Marseilles*, 10 Eq. 298. J

(v) for commissions paid to themselves, without the knowledge of the shareholders, on sales and purchases by the company, *Oxford Benefit Building Society*, 35 C.D. 502. K

(vi) for payment of improper underwriting commissions, *Metropolitan Coal Ass. v. Scrimgeour*, 1895, 2 Q.B. 604, W.N. 108. L

(vii) for breach of trust in not investing premiums in an assurance company for the benefit of policy-holders in accordance with the regulations of the company, *British Guardian Co.*, 14 C.D. 335. M

N.B.—No allowance will be made in respect of lapsed policies [*Scholefield's case* (1882) W.N. 22;] payments to one director for “services” in procuring subscriptions where it does not appear that any services have been rendered beyond those rendered in the capacity of director

3.—“Has misapplied . . . any misfeasance or breach of trust in relation to the company ”—(Continued).

A.—Misfeasance by Directors—(Continued).

and covered by his remuneration as director, *Merchants Fire Office v. Armstrong* (1901) W.N. 163]. For all moneys of the company expended by the directors, not in the ordinary course of business, since the commencement of the winding-up. *Neath Harbour Smelting Co.*, (1897) W.N. pp. 87, 121. N

(e) Directors who do not disclose the fact that they are vendors of property to the company are guilty of a breach of duty, and the company has a remedy against them. *Theatre of Varieties, Ltd.*, (1902) 2 Ch. 809, C.A. O

(f) A misfeasance summons is the proper mode of procedure where shares or debentures have been improperly issued to directors at a discount or undervalue. *Re London and Colonial Finance Corporation*, (1897) 18 T.L.R. 576, C.A. P

(g) Or where directors have improperly paid dividends out of capital. *Dovey v. Cory*, (1901) A.C. 477. Q

N.B.—It is said that the liquidator may recover against the directors although all the creditors have been paid off (*Re National Bank of Wales Ltd.*) (1899) 2 Ch. 629, C.A. R

(h) But when in such a case there is enough in hand to pay the costs of winding-up and the liquidator, the Court may refuse, even on the liquidator's application, to order directors to pay what has been paid as dividend out of capital where the result would be that the money would go to those who had received the illegal dividend. (*Re Tilling (G.I.) & Sons.*), (1906), Times, May 16. S

(i) Or where they have generally acted *ultra vires*.

N.B.—Where the misfeasance is an act which is not *ultra vires* or dishonest, directors are not liable unless it is shown that they did not really exercise their judgment. (*Re New Mahonaland Exploration Co.*), (1892) 3 Ch. 577, 585. T

If they act within their powers with such care as is reasonably to be expected from them having regard to their knowledge and experience, and honestly for the benefit of the Company, they are not liable. (*Re National Bank of Wales Ltd.*), (1899) 2 Ch. 671, C.A. U

Where, however, the act is *ultra vires*, the directors, although they have acted quite honestly, are liable to replace the moneys which have been misapplied. *Re Sharpe, Re Bennett, Masonic & General Life Assurance Co. v. Sharpe*, (1892) 1 Ch. 154, C.A. Y

Unless they act after making proper enquiry and exercising due care and on reasonable grounds, in which case they are not liable for paying dividends out of capital if it subsequently appears that in fact there were not sufficient profits. (*Re Kingston Cotton Mill Co.*, (No. 2, *supra*); see p. 272, *ante*. W

(j) *De facto* directors or managers are liable if loss has resulted to the company through their act of misfeasance. *Coventry and Dixon's case*, (1880), 14 Ch. D. 660, 670 C.A. X

3.—“Has misapplied....any misfeasance or breach of trust in relation to the company”.—(Continued).

A.—Misfeasance by Directors—(Concluded).

- (k) A transaction which may have been intended to deceive the public, but which is not a fraud on the share-holders, is not within the section. *Ambrose Lake Tin Co.*, 14 C.D. 390. **Y**
- (6) Director not liable.
- (a) An innocent director is not liable under S. 165 for the fraud of his co-directors. *In re Denham and Company*, 25 Ch. D. 752. Cited in 19 C. 688 (695). **Z**
- (b) A director is not liable for abstaining from taking steps to recover promotion-money improperly paid before he became a director. *Forest of Dean Coal Co.*, 10 C.D. 450. **A**
- (c) Nor for misfeasance committed at Board meetings at which he was not present, and in which he takes no active part, *Lands Allotment Co.* (1894), 1 Ch. 616; *National Bank of Wales* (1899), 2 Ch. 629. **B**

B.—Misfeasance by Secretary.

Misfeasance by a Secretary.

- (a) A secretary being an agent of the company is in a similar position to that of a director, and is liable for any secret benefit received from a vendor or promoter. *McKay's case*, 2 C.D.I. **C**
- (b) He is an officer, within the section, (*Ibid.*); *Mutual Aid Benefit Society*, 49 L.T. 590; *Stapleford Colliery Co.*, 42 L.T. 12. **D**
- (c) He is liable for the misappropriations of his private clerk. (*Ibid.*) **E**
- (d) So also for a breach of duty, the effect of which is to cause the directors to make improper payments. *Leeds Estate Building Co. v. Shepherd*, 36 C.D. 787. **F**

C.—Misfeasance by Manager or Trustee.

Misfeasance by Manager or Trustee.

A manager is liable for a breach of duty, the effect of which is to cause the directors to make improper payments. *Leed Estate Building Co. v. Shepherd*, 36 C.D. 787. **G**

Any trustee or manager of a savings bank who neglects or omits to comply with the rules of the bank, as to maintenance of checks, audit, &c., is liable to pay compensation for the loss occasioned to the bank by his neglect or omission. [*Davies' case*, 45 C.D. 537.] but not for mere omission to attend meetings at which certain duties ought to have been performed. *Marquis of Bute's case*, (1892) 1 Ch. 100. **H**

D.—Misfeasance by Liquidator.

Misfeasance by Liquidator.

A liquidator can only be attacked under this section when he has misapplied or become liable for or accountable for breach of trust in relation to the company not merely in relation to one particular creditor or contributory. *Hill's Waterfall Estate Co.*, (1896) 1 Ch. 947. See, also, p. 89.

A liquidator can apparently only be brought to account on a misfeasance summons when he has misapplied or become liable or accountable for moneys of the company, or been guilty of misfeasance or breach of

3.—“*Has misapplied . . . any misfeasance or breach of trust in relation to the company*”—(Continued).

D.—Misfeasance by Liquidator—(Concluded).

trust in relation to the Company. He is not liable in such proceedings for a breach of trust or misfeasance in relation to a particular shareholder, [*Re Hill's Waterfall Estate & Coal Mining Co.*, (1896) 1 Ch. 947, 953,] except where the assets have been distributed without providing for the claim of a particular creditor, at any rate where that creditor is the Crown in respect of income tax, *Re New Zealand Joint Stock and General Corporation* (1907) 23 T.L.R. 238. J

N.B.—Where assets have been distributed without regard to a creditor's claim, he may, even after dissolution of the company obtain in an action damages against the liquidator for his breach of duty. (*Pulsford v. Devenish*, (1903) 2 Ch. 625. K

Where a liquidator sold the undertaking of the company nominally to a new company, but really to himself, the sale was set aside, but the liquidator and the new company were not charged with interest on profits received by them. *Silkstone & Haigh Moor Coal Co. v. Edey*, (1900) 1 Ch. 167. L

E.—Misfeasance by auditors.

(1) Auditors.

(a) The auditor's business is to ascertain and state the true financial position of the Company at the date of the audit, and his duty is confined to that. He is to ascertain it by examining the books; but he must take reasonable care to ascertain that the books shew the company's true position. His examination of the books must be, not merely for the purpose of ascertaining what they shew, but also for satisfying himself that they shew the true financial position. *London and Gen. Bank* (No. 2) (1895) 2 Ch. 673, 682, 692. M

(b) The expression commonly used, “as shewn by the books of the company,” does not confine the matter to a mere verification of the balance-sheet by the entries in the books, but is introduced to relieve the auditor from responsibility for matters kept out of the books and concealed from him, (1895), 2 Ch. 692. N

(2) Value of assets.

(a) The above statement, however, of the auditor's duty leaves uncovered that which is the most difficult question in the subject, viz., whether to any and what extent the auditor owes the duty of forming and expressing an opinion as to the value of the company's assets. Obviously a report on the financial position of the Company which ignores the question of the value of its assets is of little value; but equally obviously the auditor is not paid to discharge, and presumably is not competent to discharge, the duty of a valuer. Upon this question but little light is thrown by the judgments in *London and General Bank* (No. 21, (1895, 2 Ch. 673; see pp. 683, 684), except to this extent, that on the one hand an auditor who has formed the opinion that the assets are over-valued is bound to say so, and that on the other he owes only reasonable care and skill, and in the absence of anything to excite suspicion very little inquiry will be reasonably sufficient. But this assumes a duty to make inquiry, at any rate to some extent and under some circumstances. *Buckley on Companies*, 9th Ed., pp. 508, 509. O

3.—“*Has misapplied...any misfeasance or breach of trust in relation to the company*”—(Continued).

E.—Misfeasance by auditors—(Continued).

- (b) The matter is a little more elucidated by *Kingston Cotton Mill Co.* No. 2, 1896, 2 Ch. 279. P

This case affirms the proposition ; (i) that an auditor is bound to be careful, but not to be suspicious : he is [said Lopes, L.J. in (1896), 2 Ch. 288] a watch-dog, but not a bloodhound ; (ii) that it is no part of his duty to take stock (a principle which goes far towards shewing that he is not responsible for checking values generally) ; and (iii) that even as regards entries in the books, he is not, in the absence of suspicion bound to investigate them for the purpose of testing whether the managing director's return of an existing state of facts (*viz.*, the amount of stock at the moment) is likely to be true, having regard to the stock dealings during the year. This last proposition must obviously be applied with care and one cannot but see that Lindley L.J. at the conclusion of his judgment so felt. *

- (c) No precise or exhaustive answer can probably be given to the question of the duty of the auditor as to the value of the assets ; it is a matter of degree. *Buckley on Companies*, 9th Ed., p. 509. Q

(3) Conduct of business.

The auditor is not concerned to see whether the business is being conducted prudently or imprudently [1895, 2 Ch. 682.] or *semble* whether the acts of the directors have been *intra vires* or *ultra vires*. His duty is to ascertain and state what is the financial result of that which has been done. (*Ibid.*) R

(4) Auditor's report.

- (a) Having completed his investigation, the duty of the auditor is to give to the members information and not merely means of information of the result. His duty is to convey information in direct and express terms, not merely to arouse inquiry. *London and Gen. Bank*, (No. 2) 1895, 2 Ch. 673, 684, 685, 694. S

- (b) It is true that under some circumstances much commercial injury might be done by publicity in a printed document circulated among a large body of share-holders, and it is possible that if publicity would be very injurious, an auditor would discharge his duty if he made a confidential report to the share-holders and invited their attention to it, and told them where they could see it. But an auditor who gives share-holders means of information instead of information does so at his peril, *London and Gen. Bank*, (No. 2) 1895, 2 Ch. 673, 684, 685, 694.

- (c) If the auditor does not discharge his duty, and as the natural and immediate consequence of his breach of duty, acts are done, such as the payment of dividends out of capital, which are a misapplication of the company's funds, the auditor is liable. *Leeds Co v. Shepherd*, 36 Ch. D. 787. T

(5) Misfeasance summons, proper remedy.

A misfeasance summons is a proper remedy where an auditor by his neglect of duty has enabled property of the company to be improperly paid away, as for instance, in dividends. *Re Kingston Cotton Mill Co.*, (No. 2), (1896) 2 Ch. 673, C.A. U

3.—“Has misapplied, . . . any misfeasance or breach of trust in relation to the company”—(Concluded).

E.—Misfeasance by auditors—(Concluded).

(6) Non-feasance.

Non-feasance as distinguished from misfeasance is not excluded. Where an auditor, owing to want of skill and care certifies erroneous accounts, held that it is misconduct and if it leads to the payment of the dividend out of capital a remedy can be had under this section. *Kingston Cotton Mill* (No. 2), 1896, 2 Ch. D. 279, 289, 288. Y

Such an act would have exposed the auditor to an action. *Leeds Co. v. Shepherd*, 36 Ch. 787. W

4.—“The Court may on the application . . . contributory of the Company.”

(1) By whom applications may be made.

(a) The section may be put into force on the application of any liquidator or of any creditor or contributory of the company, so that *semble*, if the Court thinks proper to make an order it may make it on the application of any one of these. See *National Funds Co.*, 10 Ch. D. 118 5 Bom. L.R. 638. X

(b) The applicant must *semble* be a person having a pecuniary interest. (*Ibid.*) Y

(c) A fully paid share-holder in a company whose assets are insufficient to pay its debts has properly no *locus standi* to recover moneys on the ground of misfeasance. (*Ibid.*) Z

A fully paid share-holder, where the assets are insufficient to pay debts, cannot apply. *Cavendish-Bentinck v. Fenn*, 12 A.C. 652. A

(d) Nor a bankrupt contributory, *Cape Breton Co.*, 19 C.D. 77. B

(2) Liquidator's rights.

(a) The liquidator has more extensive rights than the Company had as a going concern. *Waterhouse v. Jamieson*, (1870) L.R. 2 Sc. & Div. 29, 32. C

(b) Where there is any doubt, the liquidator's application can be amended by adding a creditor's name. (*Ibid.*) D

(3) Limitation Act, Sch. II, Art. 36—Proceedings under this section—Application against directors for refund of money.

(a) An application under S. 214, Indian Companies Act, made by the Official Liquidator praying that the Directors of the Company be ordered to pay over to him a sum improperly distributed among the share-holders, not being a suit, is not governed by Art. 36, Sch. II of the Limitation Act. 19 M. 149. E

(b) The special proceedings provided for by S. 214 is not subject to the limitation prescribed by Art. 36, Sch. II, Limitation Act, 18 A. 12. F

(c) It may well be that the Legislature intended not to provide any limitation in cases in which Courts proceeded to enforce the provisions of S. 214 of Act No. VI of 1882, 18 A. 12 (15). G

(d) The provisions of that section could seldom be put in force if Art. 36 of Sch. II of the Limitation Act applied. (*Ibid.*) H

4.—“The Court may on the application . . . contributory of the Company”
—(Continued).

(e) The misapplication or misfeasance of that section might not be discovered by the Court until after the lapse of two years from the date of the misapplication or misfeasance. (*Ibid.*) I

(f) It appears to us that there is good reason why directors, managers and officers of companies registered under Act No. VI of 1882 should not be permitted to plead limitation so as to absolve them from making restitution of moneys misapplied or lost to the company through their misfeasance. (*Ibid.*) J

(g) It may be that this is not exactly the same view of the law as that entertained by some of the Courts in England in cases under 53 and 54 Vic. C. 62, S. 10. (*Ibid.*) K

(h) However, the Statute of Limitations which Judges in England have to apply to those cases is certainly wider in its wording than the articles of the Limitation Act which we have to apply in this country. There they did not allow any plea of limitation where the person charged was in the position of a trustee of the Company, such as a director; and the cases in which they allowed this plea of limitation to be raised were actions brought against an officer, and not proceedings under 53 and 54, Vic. C 62, S. 10. (*Ibid.*) L

(4) Statutes of Limitation—When can be pleaded, under the English Law.

Where the misfeasant is not in a fiduciary relationship, the statutes can be pleaded, e.g., misfeasance by auditors. *Leeds Estate Co. v. Shepherd*, 36 C.D. 787. M

Where the misfeasant is in a fiduciary relationship the statutes could not be pleaded formerly, *Flitcroft's* case, 21 C.D. 519; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319, Oxford B.S. 35 C.D. 502; *Re Sharpe*, (1892), 1 Ch. 154. N

N.B.—But since the Trustees Act, 1888, can now be pleaded, *Lands Allotment Co.*, (1894), 1 Ch. 616; and see *National Bank of Wales*, (1899), 2 Ch. at p. 644. O

That Act, however, excepts cases of fraud, and claims to recover trust property retained or received and converted by the trustee. This covers the secret profit of a promoter, *Sale Hotel Co.*, 1897, W.N. 174. P

Where the misfeasance consists of neglect of duty, time runs from the date of the misfeasance, [*Leeds Estate Co.*, v. *Shepherd*, 36 C.D. 787,] but if the misfeasance be the receipt of money (not belonging to the company), but which the company is entitled to claim, on the ground that the receipt of it was a fraud on it, time does not run till the discovery of the fraud. *Metropolitan Bank v. Heiron*, 5 Ex. D. 319; *Re Pitrooy Bessemer Steel*, 50 L.T. 144 (notice to board not independent, insufficient). Q

In order to render the directors or other agents of the company personally liable for deceit, there must be a material misrepresentation knowingly false, or made without belief in its truth, or with a reckless disregard whether it is true or not, or there must be a material fact knowingly withheld. If a statement is made, however unreasonably, in the honest belief that it is true, it is not fraudulent, and does not render the person making it liable to an action for deceit. *Derry v. Peek*, 14 A.C. 337. R

4.—“The Court may on the application...contributory of the Company”
—(Concluded).

It must not only be shown that such misrepresentation or concealment was made with the object of deceiving the person defrauded, but that it did deceive him. *Ship v. Crosskill*, 10 Eq. 73.

The misstatement need not be the only inducement to the Act of the person deceived. *Derry v. Peek*, 14 A.C. 337. S

5.—“Examine.”

(1) Company—Voluntary winding up—Practice—Procedure—Mode of inquiry by summons in chambers.

- (a) Where contributories of a Company in voluntary liquidation complain of the conduct of liquidators in the winding-up, and desire an inquiry under S. 214 of the Indian Companies Act (VI of 1882), the proper procedure is by summons in chambers. 19 B. 88. T
- (b) Though the Company is in course of voluntary liquidation, the Court, on its aid being invoked by the liquidators or contributories, is enabled by S. 182 to determine questions and to exercise powers given by the Act to the same extent as if the Company were being wound up by the Court or under its supervision. 19 B. 88 (91). U
- (c) This section has been interpreted by the Courts in England in the broadest and most extensive sense. (*Ibid.*) Y
- (d) In *In re Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808, Sir George Jessell, M.R., said: “In a voluntary winding-up, a liquidator may apply to the Court to decide any question fairly arising in the winding-up, and it is much cheaper to bring it before me by way of motion than by an action. 809-10.” (*Ibid.*) W
- (e) It was at one time a question whether the Court would exercise the stringent powers conferred by S. 214 in the case of a Company being voluntarily wound up. (*Ibid.*) X
- (f) But that doubt was set at rest by *Rance's* case, L. R. 6 Ch. 101, where the Court of appeal, reversing a decision of the Master of the Rolls, made an order, in the case of a Company being wound up voluntarily, that one of its past directors should repay a sum of £125 to the Company. (*Ibid.*) Y
- (g) That case is also important as showing how the Court's aid is invoked in such a case. (*Ibid.*) Z

There the liquidator took out a summons to have it declared that Mr. Rance was liable to pay the sum in question and asking for an order that he should pay it. (*Ibid.*) A

- (h) The same course was adopted in *In re National Funds Assurance Co.*, 10 Ch. D. 118, where a summons was also taken out. This was a compulsory winding-up. 19 B. 88 (92). B
- (i) In the case of *In re British Corporation*, 5 Ch. D. 749, leave to serve a summons in Scotland, taken out under the section in question, was granted. (*Ibid.*) C
- (j) Mr. Palmer in his work (p. 808, 4th Ed.) states that the application was usually made by summons. The form is given at p. 809. I have examined all the cases in the Law Reports cited by Mr. Palmer under the section, and find that in all of them (a very large number), where

5.—“*Examine*”—(Continued).

the nature of the proceedings is indicated (except in *Stringer's* case, where the application was upon notice of motion) they were by way of summons. (*Ibid.*) D & E

- (k) It may, therefore, I think, be taken that the practice in the Supreme Court in England under the Act of 1862 was to initiate proceedings under S. 214 by summons. (*Ibid.*) F

- (l) When proceedings allowed by S. 182 of the Indian Act are initiated by contributories, notice to the liquidator ought to be given, as *prima facie* he is, as it were, *dominus litis*, and is presumably the most proper person to conduct the proceedings. *In re Gold Company*, 12 Ch. D. 77, cited in 19 B. 88 (92). G

- (m) When the proceedings are, however, taken against the liquidator himself, it may be presumed that he does not desire to initiate them himself, and in such a case it is not, therefore, necessary that he should have notice beyond the notice given by the service of the summons upon him. (*Ibid.*) H

- (n) It might have been thought, having regard to the closing provision of S. 182 of the Indian Act, that the Court, before issuing a summons under S. 214, should give its leave or sanction to such proceedings being taken,—beyond, I mean, the sanction involved in the issuing of the summons itself. (*Ibid.*) I

- (o) This is not so—I cannot find in the English cases any trace of the Court, when its assistance is invoked under S. 182, to put in force the provisions of S. 214, making any preliminary order or even giving any preliminary sanction. 19 B. 88 (93). J

- (p) In *Rance's* case, L.R. 6 Ch. 104, where the application of S. 214 to the case of a voluntary liquidation is so fully discussed, the Court does not suggest the necessity of such preliminary order or sanction. (*Ibid.*) K

- (q) It is thus in a certain sense discretionary jurisdiction given to the Court. (*Ibid.*) L

- (r) The section (182) does not give the applicant an absolute right to call on the Court to exercise its powers. (*Ibid.*) M

- (s) It is, therefore, fit and just that the person attached, on the return of the summons taken out against him, should have an opportunity of showing not only that he has a good defence upon the merits, but also that there are peculiar circumstances in the case; that it would involve him in some peculiar hardship if the claim against him were to be tried in this summary way; which would render it unjust to put the powers of S. 214 in force against him. (*Ibid.*) N

- (t) If an *ex-parte* order has already been made under S. 182, that an enquiry shall take place under S. 214, the Judge hearing the summons would be deprived of his power to hear the person sought to be charged in support of such an objection. He would be robbed of his discretion. (*Ibid.*) O

- (u) Where it is sought to make an officer of a company liable for misappropriation of the funds of a Company, or for misfeasance or breach of trust in relation to its affairs, the sum sought to be recovered should

5.—“*Examine*”—(Concluded).

be definitely stated in the summons, and the grounds upon which the application is based should be fully and adequately set out in an affidavit or affidavits. 19 B. 88 (94). P

(2) Use of notes at public examination.

Where, in a public examination, it appears that the persons examined, or some of them, have misapplied or retained or become liable or accountable for, moneys or property of the Company, or have been guilty of misfeasance or breach of trust in relation to the company, then, in any misfeasance proceedings subsequently instituted, the verified notes of the examination of each person who was publicly examined are admissible in evidence, (subject to any order or direction of the Court as to the manner and extent in and to which the notes are to be used, and subject to all exceptions to the admissibility in evidence against any particular person or persons of any of the statements contained in the notes of the examination) against any of the persons against whom the application is made, provided that he was, or had the opportunity of being, present at and taking part in the examination. Before any such notes are used the person intending to use them must, not less than fifteen days before the day appointed for hearing the application, give notice of his intention to each person against whom it is intended to use the notes, or any of them, specifying the notes or parts of the notes which it is intended to read against him, and furnish him with copies of such notes, or parts of notes except notes of the person's own depositions. Every person against whom the application is made is at liberty to cross-examine or re-examine (as the case may be) any person, the notes of whose examination are read, in all respects as if such person had made an affidavit on the misfeasance application. *Halsbury's Laws of England*, Vol. V, pp. 484, 485; *Re London and General Bank*, (1894), 63 L.J. (Ch.). 853. Q

6.—“*To repay any moneys.... misfeasance.*”

(1) Proceedings taken against whom.

Proceedings under this section may be taken against all or any of the persons named for any misfeasance resulting in loss to the company.

(2) Director, *bona fide* payment to—Test of liability—Directors when excused.

(a) A *bona fide* payment made to a director as part of an arrangement which the company considers for its benefit may be upheld, even if made at a time when the company is in difficulties. *Adamson's case*, 18 Eq. 670.

If it appears to the Court during the proceedings that a director, or person occupying the position of director of a company who is charged with negligence or breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the negligence or breach of trust, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think proper. *Halsbury's Laws of England*, Vol. V, p. 488. R & S

N.B.—Where, as is usually the case, a director is paid for his services, the Court is not so likely to give him relief as it would be given to a person acting gratuitously (*National Trustees Co. of Australasia v. General Finance Co. of Australasia*, (1905) A.C. 378, 381, P.C.

6.—“To repay any moneys.... misfeasance”—(Continued).

- (b) Where money is lost to the company through an error of judgment of the directors, it cannot be recovered either under this section or by action *Davey v. Cory*, (1901) App. Ca. 477. T & U
- (c) It has even been said that directors have never been held liable for negligence unless it has been so gross as practically to amount to fraud, although in some cases it has been suggested that it is necessary to show gross negligence. Compare *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899), 2 Ch. 392.
- On other occasions the phrase has been objected to as meaningless. *Wilson v. Brett* (1843), 11 M. & W. 115. Y & W
- (d) The true test appears to be that first a duty must be shown and then that that duty has been neglected to the detriment of the Company, and the charge has failed more often by reason of the difficulty in showing what has been the duty neglected than by inability to prove the neglect.
- (e) On both points all the circumstances surrounding the acts and the common practice of business men have to be considered. For instance, directors must not be treated as if they were accountants knowing and understanding all that the books would show if carefully investigated, nor are they liable if deceived by the fraud of others whom they might reasonably trust, nor must auditors be treated as persons able to value the stock-in-trade of the company. *Profontaine v. Grenier*, (1907) App. Ca. 101; *Kingston Cotton Mill Co.*, No. 2, (1896) 2 Ch. 288. X
- (f) Non-attendance at board meetings is not such negligence as to create a liability. *Marquis of Bute's case* (1892), 2 Ch. 100. Y

(3) Scope of section—Directors made liable.

- (a) Directors may be ordered to repay moneys paid to a contractor for an improper purpose, *London Trust Co. v. Mackenzie*, (1893) W.N. 9. Z
- (b) Or for underwriting the capital in an unlawful manner, *Faure Electric Accumulator Co.*, (1889) 40 Ch. D. 141. A
- (c) Or the amount of shares issued as fully paid under the pretence that they were part of the purchase consideration but were in fact promotion money, *Bland's case*, (1893), 2 Ch. 612. B
- (d) Or the discount at which shares have been issued if by reason of the subsequent sale of the shares the holders are not liable to calls. *Hirsche v. Sims* (1894) App. Ca. 654. C
- (e) The section may also be used to procure the re-payment of moneys improperly received by directors, officers, or agents of the company, as e.g., remuneration improperly received by the directors, and commission taken from persons doing business with the company. *Merchant's Fire Office v. Armstrong* (1901), W.N. 163. D
- (f) Under this section damages may be recovered in respect of a wilful sale of the assets of the company at less than their proper value, and damages in respect of frauds upon the company in its formation or promotion. *New Traveller's Chambers* (1895), 12 Times, L.R. 529. E

N.B.—But a director cannot be made to account for profits made upon a re-sale to the company of property purchased by him on his own account

6.—“To repay any moneys....misfeasance”—(Continued).

and without mandate from the company, even though he purchased the property with a view to such re-sale and re-sold it without disclosing his interest. *Burkland v. Earle*, (1902), App. Ca. at p. 98.

- (g) A director induced three of his children, who were infants, to apply for shares. Shares were allotted to them, and he gave them money to make the payments on allotment. In the winding-up, the children being still infants and therefore not liable for calls, the father was under this section held liable to pay the calls, as a loss occasioned to the company by his breach of duty. All the shares were allotted, and the argument that there was no sufficient proof that the company had sustained a loss was therefore rejected. *Crenner Co., E.P. Wilson*, 8 Ch. 45. **F & G**

- (h) An order may be made under this section to compel a director to re-pay a dividend paid under a delusive or fraudulent balance-sheet. *Stringer's case*, 4 Ch. 475. **H**

- (i) Where a dividend or bonus has, after proper investigation been proposed by directors, and agreed to by share-holders, the Court will not lightly interfere with its payment. But where no profit and loss account had been made out, and no allowance made for the risks to which the Company was liable, a bonus declared under such circumstances was held to have been declared under a delusive and fraudulent balance-sheet within the meaning of *Stringer's case*, 4 Ch. 475 and an order was made upon a director to repay the bonus paid to him. *Rance's case*, 6 Ch. 104. **I**

- (j) A bonus declared and credited to a director against payments due from him on calls is money paid to or retained by him within the section. *Rance's case*, 6 Ch. 104. **J**

- (k) If directors pay dividends out of capital they are responsible not only for that which they have themselves received, but for the whole amount misapplied. *National Funds Co.*, 10 Ch. D. 118. **K**

(4) Defences to misfeasance proceedings.

Claims against the Company cannot be set off against the amount ordered to be paid, *Re Carriage Co-operative Supply Association*, (1884) 27 Ch. D. 322. **L**

Nor can the liquidator set off the amount against an assignee of a dividend owing to the respondent as a creditor of the company. *Re-Leeds and Hanley Theatres of Varieties, Ltd.*, (1904) 2 Ch. 45. **M**

In the case of retention of secret profit the respondent's discharge in bankruptcy will not release him. *Emma Silver Mining Co. v. Grant*, (1880), 17 Ch. D. 122. **N**

Except where the claim is founded upon any fraud or fraudulent breach of trust, to which the respondent was a party or privy, or is to recover trust property or the proceeds thereof still retained by the respondent, or previously received by him and converted to his use, [*Re National Bank of Wales Ltd.*, (1899) 2 Ch. 629, 663, C.A.] the Statute of Limitations can be pleaded, as for instance where an auditor has merely neglected his duties. *Leeds Estate Buildings & Investment Co v. Shepherd*, (1887), 36 Ch. D. 787. **O**

6.—“To repay any moneys.... misfeasance”—(Continued).

N. B.—A secret profit received by a promoter may be “fraudulent even in the absence of moral fraud”. *Re Hotel Botanical Gardens Co., Ex parte Heskest.* (1897), 77 L.T. 681, reversed without affecting this point, (1898) 78 L.T. 368, C.A.

(5) Set-off.

The misfeasant cannot set-off money due from the company against sums due for misfeasance &c. *Exp. Pelley*, 21 C.D. 492; P & Q

As to mode of adjusting the cross-claims, See *Leeds and Hanley Theatre*, (1904) 2 Ch. 45. R

It is a well-settled rule of law, that a separate debt cannot be set off against a joint and several claim. 9 B. 373 (404). S

“The general rule in equity as well as in law is, that joint and separate debts cannot be set off against each other” (*Storey's Eq. Jurisp.* S. 1437, 21 Ch. Div. 519. Cited in 9 B. 373 (404)). T

This rule is adopted by the Indian law in S. 111, sub-S. (g) of the Code of Civil Procedure, and is illustrated by the following hypothetical case:—A sues B and C for Rs. 1,000. C cannot set off a debt due to him by A alone. 9 B. 373 (404). U

The question has been more than once decided in Company cases, and the two following rules have been laid down:—(a) A share-holder cannot set off debt due to him from the Company against calls in a voluntary or compulsory winding-up: See *In Re Whitehouse & Co.* 1 Ch. Div. 528, and (b) that the directors cannot set off any money due from the company to them against the amounts which they were ordered to replace. *Fliteroff's case*, 21 Ch. Div. 519. 9 B. 373 (404). V

(6) Set-off—Company—Liquidation—Director.

In an action by a Company to recover a sum fraudulently obtained by the defendants, before the liquidation of the Company, one of the defendants, claimed to set off against the company a debt from the Company to him incurred prior to the commencement of the winding up:—*Held*, that the defendant could set off the debt due to him though the amounts of the debts were ascertained after the liquidation, as the debts which were sought to be set off one against the other were debts between the same parties, and in the same interest and neither resulted from a dealing with the liquidator. [*The Ince Hall Rolling Mills Co. v. Douglas Forge Co.*, (1882), 8 Q.B.D. 179, D.] 7 Bom. L.R. 246=30 B. 173. W

A director can set off a debt due to him from the Company in an action brought against him by the company though he cannot set off a debt due to him against a claim made by a liquidator under S. 214 of the Indian Companies Act. 7 Bom. L.R. 246. X

(7) Re-imbursement.

A director is entitled to—in certain cases. 2 Bom. L. R. 42. Y

(8) Damages for misfeasance or neglect.

The compensation which, under S. 214 of the Indian Companies Act, 1892, may be assessed against a defaulting director or other officer of a company, is of the nature of damages; it is therefore necessary that

6.—“To repay any moneys.... misfeasance”—(Continued).

the loss to the company in respect of which compensation is asked for, should be the direct and not a remote and more or less speculative consequence of the misfeasance or neglect of duty on the part of the director or other officer of the company from whom such compensation is sought. The special proceeding provided for by S. 214 of Act No. VI 1882 is not subject to the limitation prescribed by Art. 36 of Sch. II of the Indian Limitation Act, 1877. 15 A.W.N. 136=18 A. 12. Z

(9). Amount of damages.

(a) Assuming that a director had obtained by misfeasance, shares which, if he hold them at all, he must hold as paid up, the company's remedy is to make him account for that which he had acquired by breach of trust. This it may do in any one of three ways; first, if the misfeasant still holds the shares, and they are valuable, the company can recover them from him; secondly, if he has sold the shares at a profit they can recover the profit; thirdly, if the shares are valueless or have been sold at a loss, the company can recover as damages the sum which they have lost by being deprived of the right of allotting the shares to persons who would have paid them up. See *Carling's* case, 1 Ch. Div. 115, 126. A

(b) In the third case the Court will estimate the damages at the largest amount of damage which could at any time have been incurred, that is, at the full value of the shares at the time the misfeasant acquired them, or at any subsequent time.

N.B.—Such a principle is not applied except as against a misfeasance: *Mansell v. British Linen Bank*, 1892, 3 Ch. 159. B

(c) If shares in the company were taken by solvent persons it will be assumed against the misfeasant that these shares would have been so taken, and the damages will be the full nominal amount of the shares. *McKay's* case, 2 Ch. Div. 1. C

(d) Or if the person attacked purchased them at less than their full nominal amount then the difference between the full nominal amount and what he paid. *Weston's* case, 13 Ch. Div. 579. D

(e) And even where it was shewn that the misfeasant had in fact transferred some of the shares for a nominal consideration and had made no profit out of them, he was charged with the full nominal amount, for he had deprived the Company of the power of allotting them to other persons who might have paid the full amount. *Metcalfe's* case, 13 Ch. Div. 169. E

(f) The principle is that if that which the agent has received is money, he must hand over the money; if something else, then the principal may insist on having it, or, if he chooses the value of it. The value is to be measured by the best price which the principal could have obtained if the agent had at once told him the facts, and the principal had then taken the property and subsequently sold it at the highest value reached. The value, therefore, is the highest value between the date of the wrongful act and the date when it came to the knowledge of the principal. *Eden v. Ridsdale's Lamp Co.* 23 Q.B. Div. 368. F

6.—“To repay any moneys....misfeasance”.—(Concluded).

(g) But this rule as to the assessment of damages must not be pressed harshly, at all events where the directors are not guilty of moral fraud. Where the directors had allotted large batches to themselves for which they were, under the circumstances, liable to account, the Court refused to regard the price obtainable for small lots of shares as an index of the value of the large batches of shares in question, and the directors were made to account merely for the profits they received on the shares which they had sold, and for the market value (as on the respective dates of allotment) of the shares which they had retained. *Shadb v. Holland*, 1900, 2 Ch. 305. G

(h) Where there is a market price, the highest market price is the proper measure of value; but in the case cited there was no real market. 1900, 2 Ch. 312. H

(i) The principle upon which damages are assessed against a misfeasant is not applied to a case in which a director acts *ultra vires* (as by issuing shares at a discount), but *bona fide*. In such a case he may be liable for the discount, but not for more. *Hirsche v. Sims*, 1894 A.C. 654. I

(10) Assignment of claim.

The claim for misfeasance is a chose in action, which can be assigned by the liquidator, *Park Gate Waggon Works*, 17 C.D. 234. J

An order has even been made in a debenture-holder's action to sell such a claim by auction, [*Wood v. Woodhouse and Rawson*, (1896), W.N. 4], moneys recovered on such a claim being covered by debentures charging all the undertaking and property of the company, subject to costs. *Anglo Austrian Printing Union* (1895) 2 Ch. 891. K

(11) Appeal—Court-fees.

An order under S. 214 of Act No. VI of 1882 (Indian Companies Act) is not a decree or an order having the force of a decree and consequently an appeal from such an order to a High Court is properly stamped, with reference to Act VII of 1870 (Court Fees Act), Sch. II, Art. 11 (b) with a Court Fee Stamp of Rs. 2. (Reference under S. 28 of Act VII of 1870, February 6). 15 A.W.N. 56. L

As to the nature of the orders, see, also, 29 C. 688.

7.—“Moneys.”

“Money or property of the company” include money had, and received for the use of the company at law or in equity. *Salé Hotel Co.*, 78 L.T. 368. M

8.—“Interest.”

Interest.

The section provides for payment of interest at such rate as the Court thinks just. According to the practice in the English Courts the rate for a simple breach of trust is usually 4 per cent. from the time of misapplication. *Re Sharp*, (1892), 1 Ch. at p. 169. N

But for actual misfeasance or wilful breach of trust the rate is usually 5 per cent. *Drum Slate Quarry Co.*, 55 L.J. Ch. 36. O

9.—“Banker.”

[See *supra*.]**Banker—Meaning of.**

The Imperial dictionary defines a banker to be “one who traffics in money, receives and remits money, negotiates bills of exchange. 9 B. 373 (411). P

A bank is defined as “an establishment which trades in money, an establishment for the deposit, custody, and issue of money, as also for granting loans, discounting bills and facilitating the transmission of remittances from one place to another.” (*Ibid*) Q

What constitutes a banker has also been the subject of judicial decision. (*Ibid*). R

For instance, “a stock-broker and a notary public who largely engaged in trade, who received money from some of his customers, and paid it out again upon their drafts, and occasionally discounted bills, but neither held himself out to the public as a banker, nor appeared to be considered by the public as such, and the entries in whose books of banking transactions were mixed up with those appertaining to his other callings was not held to be a banker in the strictly legal sense of the term. *Stafford v. Henry*, 12 Ir. Eq. Rep. 400. S

10.—“Explanation II.”

(1) Section personal.

The section is personal only as against the director or officer, and does not apply as against the executors of a deceased director or officer. *Feltrom's Executor's case*, 1 Eq. 219. T

Where the acts of a body of officers are impeached some of whom are dead, the survivors can be proceeded against under the section. *British Guardian Co.*, 14 Ch. D. 835. U

(2) S. 214, Expl. ii—Legal representative.

R, W and others, contributories to a company which had gone into liquidation, filed an application under S. 214 of Act VI of 1882, directed against certain officers of the company. That application was dismissed, and an order was also made giving costs against the applicants. The applicants appealed to the High Court against the order of dismissal. Pending this appeal one of the opposite parties died, and it was sought to put his legal representatives upon the record of the appeal as a respondent. *Held*, that in view of explanation II to S. 214 of the Indian Companies Act, 1882, the legal representatives of the said deceased respondent could not be brought upon the record either in respect of the relief prayed for in the original application or in respect of the order making costs payable by the applicants, as that order could not be separated from the dismissal of the application. 16 A.W.N. 28. Y

(3) When the misfeasance of directors is a breach of trust and not a personal decree.

Where, under the articles of association, the business of the company is to be conducted with the assistance of an agent, the directors cannot delegate all their duties to such agent so as to divest themselves of their

10.—“*Explanation II*”—(Concluded).

trust and responsibility. If the agent proves unfaithful, the directors can be held liable as much as if they themselves had been unfaithful. In this case, instead of performing their duty and showing reasonable diligence, the defendants delegated all the control to the agents, the bankers, and so enabled them to misapply the Company's money and were therefore held liable for such misapplication. On the question of the liability of the estate of the deceased director, *held*, the misfeasance of a director constitutes a breach of trust and is more than mere negligence. Negligence depends upon the public duty which is incumbent upon every one to exercise due care in his daily life; but a breach of trust depends upon the neglect of some special duty undertaken in regard to some specified person or body of persons. In the former case, the liability dies with the person; in the latter it follows his estate after his death. 9 B. 373. W

215. If any director, officer, or contributory of any Company wound up under this Act, destroys, mutilates, alters, falsifies¹, or fraudulently secretes any books, papers, writings, or securities, or makes, or is privy to the making of, any false or fraudulent entry in any register, book of account, or other document belonging to the Company, with intent to defraud or deceive any person, every person so offending shall be punished with imprisonment for a term which may extend to two years, and shall also be liable to fine which may extend to five hundred rupees.

(Notes).

Corresponding English Law.

“If any director, officer, or contributory of any company being wound up destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company with intent to defraud or deceive any person, he shall be guilty of a misdemeanour, and be liable to imprisonment for any term not exceeding two years with or without hard labour.” S. 216 of the English Companies (Consolidation) Act, 1908. X

1.—“*Falsifiers.*”

Making false balance sheet before winding-up no offence.

This section which provides for the punishment of “any director, officer or contributory of any Company wound up under this Act” who, *inter alia*, “makes or is privy to, the making of any false or fraudulent entry in any register, book of account, or other document belonging to the Company, with intent to defraud or deceive any person,” would not apply to false statements contained in a balance-sheet published before the commencement of the winding-up of the Company. 16 A. 88. Y

1.—"Falsifier"—(Concluded).

The making of a false balance sheet by the Directors, Manager and Accountant of a Company dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, where it is made prior to the commencement of the winding-up of the company, is not an offence within the meaning of this section. 14 A.W.N. 23. **Z**

The person charged should direct the jury to acquit on the charges under S. 191, I.P.C. and S. 215 of this Act, 16 A. 88. **A**

216. Where any order is made for winding-up a Company by the Court or subject to the supervision of the Court, if it appear in the course of such winding-up that any past or present director, manager, officer, or member of such Company has been guilty of any offence in relation to the Company for which he is criminally responsible, the Court may, on the application of any person interested in such winding-up, or of its own motion, direct the official liquidators or the liquidators (as the case may be) to institute a prosecution for such offence, and may order the costs and expenses of such prosecution to be paid out of the assets of the Company ¹.

Prosecution of delinquent directors in case of winding-up by Court.

(Notes).

(1) Corresponding English Law.

This section corresponds to S. 217 para (1) of the English Companies (Consolidation) Act, 1908. **B**

1.—"Prosecution....assets of the Company."

(2) Criminal prosecution at the expense of the estate—Determining factor.

In determining whether criminal prosecution at the expense of the estate should be directed, the Court will look to see whether the case is one in which it would be the duty of a good citizen, even at a loss to himself, to institute proceedings. *London and Globe Corp.*, 1908, 1 Ch. 728. **C**

Instances.

- (i) Upon this principle an order was made in the *London and Globe Corp.* 1908, 1 Ch. 728, which resulted in a conviction.
- (ii) In *Mercantile Marine Insurance Co.*, May, 1882, *North J.*, made an order on the same principle.
- (iii) *Chitty, J.*, did so in *Denham & Co.*, 1884, W.N. 122; 53 L. J. (Ch.) 1113; 51 L.T. 570; 32 W. R. 920. **D**

217. If any person, upon any examination upon oath authorised under this Act, or in any affidavit, deposition or solemn affirmation, in or about the winding-up of any Company under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years and shall also be liable to fine.

Penalty for false evidence.

(Notes).**Corresponding English Law.**

This section corresponds to S. 218 of the English Companies (Consolidation) Act 1908. In the English Act for "intentionally" the expression "wilfully and corruptly" is used. There it is stated that a person committing an offence described in the section shall be liable to the penalties for wilful perjury.

(2) Analogous Indian Law.

Cf. S. 193 of the Indian Penal Code (Act XLV of 1860).

E

218. Where the High Court makes an order for winding-up a Company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a District Court; and thereupon such District Court shall, for the purpose of winding-up the Company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding-up, all the jurisdiction and powers of the High Court.

Winding-up may be referred to District Court.

219. If during the progress of a winding-up in a District Court it is made to appear to the High Court that the same could be more conveniently prosecuted in any other District Court, the High Court may transfer¹ the same to such other Court, and thereupon the winding-up shall proceed in such other District Court.

Transfer of winding-up from one District Court to another.

(Notes).**1.—"Transfer."****Power of High Court to transfer proceedings—Letters Patent, S. 9.**

There is nothing in the Indian Companies Act (VI of 1882) or the High Courts Act (24 and 25 Vic. C. 104) or the Letters Patent, which prevents the High Court from calling for the record of the proceedings in the winding-up of a Company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by S. 647 read with S. 25 of the C.P.C., 9 A. 130=7 A.W.N. 7.F

S. 647 of the Civil Procedure Code makes applicable to all miscellaneous proceedings, not specially provided for, the general procedure prescribed by the Code for suits and appeals. So, under S. 25 read with that section, the High Court, irrespective of the Indian Companies Act or the Letters Patent, has ample powers to call for the proceedings before the lower Court in cases of winding up of companies and to transfer them to its own file.

Where, in the proceedings in the winding-up of a company under this Act an order was passed admitting the proof of a particular creditor of the company before any liquidator had been appointed, *Held*, that this was an irregularity which by itself would justify the High Court in sending for the record. (*Ibid.*) **G**

I. — "Transfer"—(Concluded).

Where the District Judge conducting the proceedings in the winding-up of a company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to re-consider if the matter again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the District Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with winding-up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other, held that under these circumstances the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding-up proceedings to its own file. (*Ibid.*) H

PART V.

REGISTRATION-OFFICE.

220. The Registration of Companies under this Act shall be conducted as follows (that is to say) :—

Constitution of registration-office.

- (a) The Local Government may, after the sanction of the Governor General in Council to the creation of any such offices shall have been obtained, from time to time appoint¹ such Registrars, Assistant Registrars, clerks, and servants as it may think necessary for the Registration of Companies under this Act, and remove them at pleasure :
- (b) The Local Government may make such regulations² as it thinks fit with respect to the duties to be performed by any such Registrars, Assistant Registrars, clerks and servants as aforesaid :
- (c) The Local Government may from time to time determine the places³ at which offices for the registration of Companies are to be established, so that there be at all times maintained in each of the towns of Calcutta, Madras and Bombay at least one such office, and that no Company shall be registered except at an office within that part of British India in which, by the memorandum of association, the registered office of the Company is declared to be established :

- (d) The Local Government may from time to time direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of Companies :
- (e) Every person may inspect the documents kept by the Registrar of Joint-Stock Companies. There shall be paid for such inspection such fees as may be directed by the Local Government, not exceeding one rupee for each inspection. Any person may require a certificate of the incorporation of any Company, or a copy or extract of any other document or any part of any other document, to be certified by the Registrar. There shall be paid for such certificate of incorporation, certified copy or extract, such fees as the Local Government may direct ⁴, not exceeding three rupees for the certificate of incorporation, and not exceeding two annas for each hundred words of such copy or extract :
- (f) The existing Registrar, Assistant Registrars, clerks and other officers and servants in the office for the registration of Joint-Stock Companies shall, during the pleasure of the Local Government, hold the offices and receive the salaries hitherto held and received by them : but they shall, in the execution of their duties, conform to any regulations that may be issued by the Local Government :
- (g) There shall be paid to any Registrar, Assistant Registrar, clerk or servant that may hereafter be employed in the registration of Joint-Stock Companies such salaries as the Local Government may, with the sanction of the Governor General in Council, direct :
- (h) Whenever any act is herein directed to be done to or by the Registrar of Joint-Stock Companies, such act shall, until the Local Government otherwise directs, be done to or by the existing Registrar of Joint-Stock Companies, or in his absence to or by such person as the Local Government may for the time being authorise. But, in the event of the Local Government altering the constitution of the existing registry-office, such act shall be done to or by such officer or officers, and at

such place or places with reference to the local situation of the registered offices of the Companies to be registered, as the Local Government may appoint.

(Notes).

This section corresponds almost to S. 243 of the English Companies (Consolidation) Act, 1908. I

The functions of the Local Government here are taken up by the Board of Trade in England.

1.—“*Appoint.*”

(1) **Appointments made under the power conferred by this section.**

For—in :—

- (1) Assam, *See* Assam list of Local Rules and Orders, Ed., 1893, p. 81.
- (2) Eastern Bengal and Assam, *See* Eastern Bengal and Assam Gazette, 1903, Pt. I, p. 1143.
- (3) Bombay, *See* Bombay Government Gazette, 1897, Pt. I, p. 1803.
- (4) Coorg, *See* Coorg Gazette, 1904, Pt. I, p. 30.
- (5) United Provinces of Agra and Oudh, *See* U.P.R. and O.
- (6) Burma, *See* Bur. R.M.; Burma Gazette, 1907, Pt. I, p. 24.
- (7) N.W.P. Provinces, *See* Gazette of India, 1901, Pt. II, p. 1804.
- (8) Madras, *See* Mad. R. and O. J

(2) **Instance of notification issued under this clause.**

Under the provisions of S. 190, Act X of 1866 (new Act VI of 1882) the Hon'ble the Lieutenant-Governor has been pleased, with the sanction of His No. 76, dated 4th February, 1868. Excellency the Viceroy and Governor-General in Council, to establish an office at Allahabad for the registration of Joint Stock Companies in the North-Western Provinces.

With reference to the above, the Registrar-General of Assurances, North-Western Provinces, for the time being is appointed to be Registrar for the Registration of Companies in the North-Western Provinces under the aforesaid Act.

The Judge of Allahabad for the time being is appointed to be Assistant Registrar for the same purpose.

N.B.—This notification is kept alive by S. 2 of this Act.

2.—“*The Local Government....regulations.*”

I.—Assam.

Regulations under this section.

For—in Assam, *See* Assam Local Rules and Orders, Ed., 1893 p. 181. K

II.—Bengal.

Notification, dated the 13th August, 1878 (published in the Calcutta Gazette of 1878, Part I, pp. 938—40).

The following rules in respect to the duties to be performed by the Registrar of Joint-Stock Companies have been sanctioned by the Lieutenant-Governor under the provisions of clause 2, S. 190 of Act X of 1866, and are hereby published for general information : L

Rules under clause 2, section 190 of Act X of 1866.

The registration hours shall be between 11 A.M. and 2 P.M. every day, except on Sundays and authorized holidays.

2.—“The Local Government...regulations”—(Continued.)

11.—Bengal—(Continued).

2. The following registers and index shall be kept by the Registrar of Joint-Stock Companies :—

- (1) a general register as per Appendix I.
- (2) a register ledger „ „ II.
- (3) an index to the general register.

3. On being satisfied that the requirements of the law, have been complied with the Registrar shall proceed to register the memorandum of association and the articles of association (if any) filed with the memorandum in the following manner, *viz.*, by entering the same into the general register and by endorsing on the papers so filed the following formula :—

“Registered by me this

day of

18 .

Signature.



Registrar of Joint-Stock Companies.”

4. On receipt of every document, the Registrar shall endorse thereon the following particulars :—

- (1) the number borne by the Company in the Registrar's ledger,
- (2) the name of the Company,
- (3) the nature and substance of the document.

5. If any memorandum or articles of association of a Company be found defective or incomplete in any of the particulars required by law, the Registrar shall return the same to the party applying for registration for due rectification or completion thereof, and until such rectification or completion be made, the Registrar shall not register the document or grant certificate thereof.

6. The Registrar shall return to the Company concerned for the purpose of being amended, any document found defective or incomplete in any of the particulars required by the law, or in the preparation of which prescribed formalities have not been observed. Until the necessary rectification be made, the document shall not be filed and certificate granted.

7. The Registrar shall deposit in a separate box, labelled with the name of the company, a copy of the memorandum of association of the company concerned, which shall be lodged in the office of the Registrar.

The documents of each company shall be placed together, and kept separate and distinct from the documents of other companies.

8. On the registration of a company the Registrar shall grant a certificate to the company in the form given in Appendix III, and on the registration of any other documents authorised to be recorded he shall grant a certificate in the form given in Appendix IV.

9. He shall keep a book to be called “The Register of Joint-Stock Companies.” In this register he shall enter the names of the registered companies in the order of their registration, and he shall number each company consecutively. One page in the register shall be allotted to each company until another page is required.

Under the name of each company the Registrar shall enter a note of every registration effected or record made relating to the company, and he shall affix to each entry the date of such registration and his signature.

2.—“*The Local Government....regulations*”—(Continued).

II.—Bengal—(Continued).

From and after 1st April, 1879, the numbers assigned to the companies thereafter registered shall be in a consecutive series commencing and terminating with each official year.

An alphabetical index shall be kept of the companies registered.

10. The Registrar shall keep a daily cash-book and a duplicate chalan-book. In the former shall be entered day by day, as they occur, all receipts and disbursements of money, and the latter shall contain particulars of the cash sent from time to time to the General Treasury. All monies received shall be placed, while in the custody of the Registrar, in a cash-box, of which he shall keep the key and for the safety of which and of the cash-book and chalan-book he shall be responsible. The Registrar shall remit all fees to the treasury if possible, on the day they are received, or, if that is found impossible, early on the day following.

11. On payment of the proper fee the Registrar shall permit any person applying to do so to inspect his records under the supervision of a responsible officer.

12. The Registrar of Joint Stock Companies shall, in his discretion, institute such inquiries and investigations at the offices of registered companies or otherwise as shall be necessary to obtain information or evidence respecting defaults, or respecting any infractions of the law, made by such companies in complying with any of the provisions of the Indian Companies Act, 1866.

13. The Registrar may assign any of the duties prescribed under these rules to an Assistant Registrar, where such an officer may be appointed by Government, and may distribute the office work to the Assistant Registrar, clerks and servants in such manner as he may think fit.

14. The Registrar shall submit an annual report on the administration and working of his office, together with the following statements for the previous official year :—

- (1) Showing the name and number in the register borne by each of the joint stock companies registered, with its object, nominal capital and date of registration.
- (2) Showing the registered numbers and names of companies that have increased their capital.
- (3) Showing the registered numbers and names of companies that have commenced winding up, have been dissolved, or are otherwise defunct with their capital and dates of registration, winding-up or final dissolution.
- (4) Showing the registered numbers and names of literary scientific and charitable societies registered under Act XXI of 1860.
- (5) Showing receipts of fees realized under Tables B and C and the different sections which authorize the levying of fees.
- (6) Showing, in order of registration, the numbers and names of companies on the register on the 31st March of the preceding year, with their nominal and paid-up capitals and the date of the last balance sheet received.
- (7) Showing result of prosecutions under the Indian Companies Act.
- (8) A statement of expenditure.

(Note).

This rule was substituted for original rule 14 by notification dated 17th July, 1884, (published in the Calcutta Gazette of 1884, part I, p. 794).

2.—“The Local Government . . . regulations”—(Continued).
 II.—Bengal—(Continued).

APPENDIX I.

Name of Company.	Under what Act it was registered.	Date of registration.	Objects for which the Company was established.	Whether the Company is still working, or in course of winding-up, or has been dissolved and if dissolved the date when it ceased operation.	Remarks.	Course of winding-up dissolved.
						.

APPENDIX II.

Date of filing and registering.	Name of the Company or Association.	Nominal capital.	Documents.	By whom filed.	When certificate given, and to whom.

2.—“The Local Government...Regulations”—(Continued).

II.—Bengal—(Concluded).

APPENDIX III.

IN THE OFFICE OF THE REGISTRAR OF JOINT STOCK COMPANIES.

IN THE MATTER OF

I do hereby certify that, pursuant to Act X of 1866 of the Legislative Council of India entitled “The Indian Companies Act,” Memorandum of Association has been his day filed and registered in my office, and that the said Company has been duly incorporated and is a Company limited by shares, pursuant to the provisions of the said Act.

Dated this day of one thousand eight hundred and seventy.

Memo of fees.					Rs. A. P.
For registering the Company
„ Articles of Association
Total Rs.				

Registrar of Joint-Stock Companies.

APPENDIX IV.

IN THE OFFICE OF THE REGISTRAR OF JOINT STOCK COMPANIES.

IN THE MATTER OF

I do hereby certify that, pursuant to Act X of 1866 of the Legislative Council of India entitled “the Indian Companies Act,”

has been this day duly filed and registered in my Office, dated this
day of one thousand eight hundred and seventy—

Memo of fees.					Rs. A.
For registering Articles of Association
„ Notice of increase of Capital
„ Notice of Increase of Members
„ Notice of situation of registered office
„ Notice of change of situation of Registered office
„ special resolution
Total Rs.				

Registrar of Joint Stock Companies.

(See Bengal Local Statutory Rules and Orders, 1903, Ed., Vol. II, pp. 71—76. M)

III.—Bombay.

Duties of the Registrar and Assistant Registrar of Joint Stock Companies.

* Notn., dated 21st November, 1866, B. G. G., 1866, Vol. II, p. 1882—Under the provisions of S. 190 of the Indian Companies Act, 1866, His Excellency the Governor in Council is pleased to make the following regulations with respect to the duties to be performed by the Registrar and Assistant Registrar of Joint Stock Companies in the Bombay Presidency:—

N.B.—* This Notification, issued under Act X of 1866, is kept in force by Act V. of 1882, S. 2.

2.—“*The Local Government... Regulations*”—(Continued).

III.—Bombay—(Concluded).

1. The Registrar of Joint Stock Companies shall, in his discretion, institute such inquiries and investigations at the offices of registered Companies or otherwise as shall be necessary to obtain information or evidence respecting defaults made by such Companies in complying with any of the provisions of the Indian Companies Act, 1866.

2. In the absence of the Registrar from Bombay, any act directed in the aforesaid Act to be done to or by the Registrar of Joint Stock Companies shall be done to or by the Assistant Registrar of Joint Companies.

3. The Registrar of Joint Stock Companies may at any time, at his discretion, direct the Assistant Registrar of Joint Stock Companies to perform any act directed to be done by the Registrar of Joint Stock Companies under the aforesaid Act. [See Local Rules and Order, Bombay, Vol. I, Ed. 1896, p. 270]. N

IV.—Burma.

Regulation under this section.

For ——— in Burma, See Bur. R.M; Burma Gazette, 1907, Pt. I, p. 133. O

V.—Central Provinces.

Rules for the registration of Companies.

The Governor-General of India in Council having sanctioned the creation of an office for the registration of Joint Stock Companies in the Central Provinces, the following Regulations, under S. 190, Act X of 1866, are published for general information :—

REGULATIONS FOR THE REGISTRATION OF JOINT STOCK COMPANIES UNDER SEC. 190, ACT X OF 1866.

1. The Registrar-General of Assurance, Central Provinces, shall be Registrar of Joint Stock Companies in the Central Provinces, and the Registrar of Nagpur for the time being shall be Assistant Registrar for the same purpose.

2. The office of the Registrar of Joint Stock Companies shall be stationed at Nagpur, and shall be open for the despatch of business from 11 A.M. to 3 P.M. daily, except on Sundays and such other holidays as are observed by the Civil Courts.

3. In case of the absence on duty of the Registrar from Nagpur, the Assistant Registrar shall perform the duties of Registrar.

4. The records of the office of Registrar of Joint Stock Companies shall be open to inspection on payment of a fee of one rupee, and the Registrar or Assistant Registrar as the case may be, shall grant certificates of incorporation of any Company on the payment of three rupees a copy and copies or extracts of any other document on payment of a fee of two annas for each hundred words of such copy or extract.

5. The certificates and copies or extracts of the documents referred to in the preceding regulations shall be granted on plain paper.

6. Certificate of incorporation granted to Companies under S. 18 of the Act shall be in the form Appendix I.

* This Notification, issued under Act X of 1866, is kept in force by Act VI of 1882, S. 2.

2.—“The Local Government....Regulations”—(Continued),

V.—Central Provinces—(Continued).

Certificates of incorporation granted to individuals under S. 190, cl. 5 of the Act, shall be in the form Appendix II; and

Certificates of incorporation of existing Companies granted to Companies under S. 205 of the Act shall be in the form Appendix III.

7. All fees levied under provisions of the Act shall be carried to the credit of Government.

FORM I.

IN THE OFFICE OF THE REGISTRAR OF JOINT STOCK COMPANIES,
CENTRAL PROVINCES.

IN THE MATTER OF

I do hereby certify that pursuant to Part I, Act X of 1866, of the Legislative Council of India, entitled “the Indian Companies Act,” “Memorandum of Association has been this day filed and registered in my office, and that the said Company has been duly incorporated, and is a Company limited by shares, guarantee an unlimited Company, pursuant to the provisions of the said Act. Dated this day of one thousand eight hundred and at Nagpur.

Memo of fees.					Rs. A. P.
For registering the Company
„ Articles of Association
„ certificates	5 0 0
Total Rs

Registrar of Joint Stock Companies, Central Provinces.

FORM NO. II.

IN THE OFFICE OF THE REGISTRAR OF JOINT STOCK COMPANIES,
CENTRAL PROVINCES.

IN THE MATTER OF

I do hereby certify that pursuant to Act X of 1866, of the Legislative Council of India, entitled “the Indian Companies Act,” the said Company has been duly incorporated, and is a Company limited by shares, guarantee an unlimited Company, pursuant to the provisions of the said Act. Dated this day of one thousand eight hundred and at Nagpur.

Memo of fees.					Rs. 3 0 0
For certificates

Registrar of Joint Stock Companies Central Provinces.

FORM NO. III.

IN THE OFFICE OF THE REGISTRAR OF JOINT STOCK COMPANIES,
CENTRAL PROVINCES.

IN THE MATTER OF

I do hereby certify that pursuant to Part VII of Act X of 1866, of the Legislative Council of India, entitled “the Indian Companies Act,” has been this day filed and registered in my office, and that the said Company has been duly incorporated, and is a Company limited by shares, and guarantee an unlimited Company, pursuant to the provisions of the said Act. Dated this day of one thousand eight hundred and at Nagpur.

2.—“The Local Government... Regulations”—(Continued).

V.—Central Provinces—(Concluded).

	Memo of fees.	Rs. A. P.
For registering the Company
For list of shareholders
Copy of Act of Parliament
Act of Governor-General of India in Council
“ Royal Charter
“ Letters Patent
“ Deed of Settlement
“ Contract of Co-partnery
“ Statement of Nominal Capital number of shares etc.,
“ Resolution declaring amount of guarantee
For certificate	5 0 0
	Total

Registrar of Joint Stock Companies, Central provinces.

[See Central Provinces Local Rules and Orders, 1896 Ed. pp. 146-148].

VI.—Madras.

* (1) Judicial Notification, dated 1st December, 1875.

(Published in the Fort St. George, dated 11th January, 1876, p. 51).

Under the provisions of clause 2, section 190 (section 220, clause (b) of Act VI of 1882) of the Indian Companies Act, 1866, No. X, the Governor in Council directs that the following Regulations be observed for the discharge of the duties of the Registrar of Joint-stock Companies :—

I. The Registrar shall personally scrutinize the memorandum of Association and the Articles of Association of any Company applying for registration, and the other documents which are required to be forwarded by any Registered Company; and he shall satisfy himself that they are in conformity with the provisions of the law before he registers them.

II. He shall keep a book, to be called “The Register of Joint Stock Companies. In this register he shall enter the names of the registered Companies in the order of their registration; and he shall number each Company consecutively.”

One page in the Register shall be allotted to each Company until another page is required.

Under the name of each Company the Registrar shall enter a note of every registration effected, or record made, relating to the Company; and he shall affix the date of such registration and his signature thereto.

From and after the 1st April, 1876, the numbers assigned to the Companies thereafter registered shall be in a consecutive series commencing and terminating with each official year.

An alphabetical index shall be kept of the Companies registered.

III. The Registrar shall give to every Company registered a certificate of incorporation in the following form :—

* This Notification issued under Act X of 1866, is kept in force under S. 2, Act VI of 1882.

2.—“The Local Government... Regulations”—(Continued).

VI.—Madras—(Continued).

FORM OF CERTIFICATE OF INCORPORATION.

No. (here enter number borne by Company on the Register).

I hereby certify, pursuant to Act X of 1866 of the Governor General of India in Council, entitled ‘The Indian Companies Act, 1866,’ that the (here enter name of Company) is incorporated as a Company under the aforesaid Act (in the case of a Limited Company, the following words will be added), and that the said Company is limited.

Madras,

(Here enter signature).

(Here enter date)

Registrar of Joint-Stock Companies.

The Registrar shall, at the same time, enter a copy of such certificate on the Memorandum of Association of the Company concerned, which shall be lodged in the office of the Registrar.

The documents of each Company shall be placed together, and kept separate and distinct from the documents of other Companies.

Endorsement on documents registered.

IV. On every document registered the Registrar shall endorse the following particulars:—

1. The number borne by the Company on the register.
2. The name of the Company.
3. The name of the document.
4. The date of registration.

and he shall affix his signature thereto.

When a document is registered, the Registrar shall intimate the same to the Company.

He shall also grant a receipt for all fees paid.

V. The Registrar shall keep an account of the fees received, and the Accountant-General shall audit such account.

Fees.

The Registrar shall retain such fees as his remuneration from 25th January, 1875, until 26th January, 1877, both days inclusive. After that date, the Registrar shall remit the fees to the Government Treasury on the day on which they are paid to him; or, if paid too late for that day, he shall remit the fees to such treasury on the following day.

VI. The Registrar shall submit an annual report to the Government of the administration and working of his department, together with a statement in detail of the fees realized.

VII. (Cancelled. Judicial Notification, No. 478, dated 6th December 1886.)

VIII. (Cancelled. G.O., No. 949, Judicial, 16th April, 1877.)

IX. The Registrar shall provide a room wherein a person applying for the inspection of a document may sit at a table and inspect it under the supervision of the Registrar.

X. Persons applying for inspection and certified copies of documents must apply to the Registrar at his office at office hours from 11 A.M. to 5 P.M.

XI. It shall be the duty of the Registrar to return to Companies concerned, for the purpose of being amended, any documents received by him in a defective or incomplete form, such as a balance-sheet unaudited a special resolution of a Company in manuscript instead of in print, or a document in which prescribed formalities have not been complied with.

2.—“The Local Government... Regulations”—(Continued).

VI.—Madras—(Continued).

XII. The following shall be the table of fees to be charged by the Registrar for inspection of documents, granting of certified copies, registering of Companies, &c. :—

*Fixed under cl. 5, section 190 of the Act by Government Notification,
9th February, 1875.*

	Rs. A. P.
An inspection of the documents kept by the Registrar	... 1 0 0
Certified copy of a certificate of the incorporation of any Company	... 3 0 0
Certified copy or extract of any other document or any part of any other document each hundred words.	... 0 2 0
<i>Payable by a Company having a capital divided into shares :—</i>	
For registration of a Company whose nominal capital does not exceed Rs. 20,000, a fee of.	... 40 0 0
For registration of a Company whose nominal capital exceeds Rs. 20,000, the above fee of 40 rupees with the following additional fees :—	
For every 10,000 rupees of nominal capital or part of 10,000 rupees after the first 20,000 rupees up to 50,000 rupees.	... 20 0 0
For every 10,000 rupees of nominal capital, or part of 10,000 rupees after the first 50,000 rupees up to 1,00,000 rupees.	... 5 0 0
For every 10,000 rupees of nominal capital, or part of 10,000 rupees after the first Rs. 10,00,000.	... 1 0 0
Provided that no Company shall be liable to pay in respect of nominal Capital on registration, or afterwards, any greater amount of fees than 1,000 rupees.	
For registering any document other than the Memorandum of Association	... 5 0 0
For making a record of any fact.	... 5 0 0
<i>Payable by a Company not having a capital divided in shares—</i>	
For registration of a Company whose number of members does not exceed 20.	... 40 0 0
For registration of a Company whose number of members exceeds 20, but does not exceed 100.	... 100 0 0
For registration of a Company whose number of members exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members or less number than 50 members after the first 100.	
For registration of a Company in which the number of members is stated in the Articles of Association to be unlimited, a fee of.	... 400 0 0
For registration of any increase in the number of members made after the registration of the Company, in respect of every 50 members, or less than 50 members, of such increase.	... 5 0 0
Provided that no one Company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the Company.	
For registering any document.	... 5 0 0
For making a record of any fact.	... 5 0 0

2.—“The Local Government... regulations”—(Continued).

VI.—Madras—(Concluded).

(2) Judicial Notification, No. 478, dated 6th December. 1866.

(Published in the Fort St. George Gazette, dated 14th December, 1866, p. 1093, Part I.)

Under S. 220, clause (b), of the Indian Companies Act, 1882, the Governor in Council is pleased to make the following rule for the guidance of the Registrar of Joint-Stock Companies :

Whenever any case of non-compliance with the provisions of the Act comes to the knowledge of the Registrar, he should request the Government Solicitor, if the registered office of the Company in default is situated in Madras, or in other cases the Magistrate of the district in which the registered office of the Company is situated, to take the necessary steps for the recovery of the prescribed penalties.

2. Rule VII of the Rules for the Guidance of the Registrar of Joint-Stock Companies, published at page 52 of the Fort St. George Gazette, dated 11th January, 1876, is hereby cancelled. [See Madras Local Rules and Orders, Ed., 1898, pp. 104-107.] Q

VII.—Punjab.

(1) Regulation under this section.

For—in Punjab, See Punjab Gazette, 1883, Pt. I, p. 489.

R

(2) Companies Act (VI of 1882), Ss. 74, 220 (b)—Regulations—Failure to file balance sheet—Registrar only competent to prosecute—Power of High Court to interfere in a pending case—Revision (Criminal).

Under the Regulations framed by the Local Government under S. 220 (b) of Act VI of 1882, the Registrar is the only officer authorised for instituting and conducting all prosecutions under the Act, specially where the prosecutions are in connection with breach of the rules relating to submission of balance sheets and other periodical returns. So a complaint under S. 74 of the Indian Companies Act VI of 1882 for default in filing a balance-sheet, not brought by the Registrar but by a clerk of his office and counter-signed by the Public-Prosecutor, is bad in law and not entertainable by a Criminal Court. 8 Ind. Cas. 190=35 P.W.R. 1910 (Cr.). S

Where by any law or Regulation a certain person is only authorised to complain about a particular offence, the proceedings of a Magistrate based on a complaint relating to that offence, made by any unauthorised person are *ultra vires* and liable to be set aside on revision by the High Court at any time during the pendency of the case. (Ibid.) T

In order to come to a conclusion whether a complaint has been properly instituted it is necessary to see S. 220 of this Act and the Regulations made thereunder by the Local Government. 8 Ind. Cas. 190 (192)=35 P.W.R. 1910 (Cr.). U

The regulations under S. 220 (with respect to the duties to be performed by the Registrar) were promulgated in Punjab Government Notification No. 60, dated 22nd August 1883. Regulations V and XIV appear to me to apply to the point under discussion. (Ibid.) V

Reg. V requires the Registrar to see that all returns are “duly and punctually furnished and the concluding words are that the Registrar shall be deemed the proper officer for instituting and conducting all prosecutions under the Act.” (Ibid.) W

Reg. XIII, certainly directs the Registrar to institute such enquiries and investigations at the offices of registered companies, or otherwise, as shall be necessary to obtain information or evidence respecting defaults or any infraction of the law, made by such companies in complying with any of the provisions of the Act. (Ibid.) X

2.—“The Local Government... regulations”—(Continued).

VII.—Punjab—(Concluded).

Reg. XIV empowers the Registrar “to assign any of the duties prescribed under these rules to an Assistant Registrar where such an officer may be appointed by Government,” and allows the registrar to “distribute the office-work to the Assistant Registrar; clerks and servants in such manner as he may think fit.” (*Ibid.*) Y

VIII.—United Provinces.

* Regulations for the Registration of Joint-Stock Companies under S. 190, Act X of 1866.

Govt. Notification
No. 76, dated 14th
February, 1868.

1. The Registrar-General of Assurances, North-Western Provinces, shall be Registrar of Joint-Stock Companies in the North-Western Provinces and the Judge of Allahabad for the being shall be Assistant Registrar for the same purpose.

2. The office of the Registrar of Joint-Stock Companies, shall be stationed at Allahabad and shall be open for the despatch of business from 11 A.M. to 3 P.M., daily, except on Sundays and such other holidays as are observed by the Civil Courts.

3. In case of the absence on duty of the Registrar from Allahabad, the Assistant Registrar shall perform the duties of Registrar.

4. The records of the office of Registrar of Joint-Stock Companies, shall be open to inspection on payment of a fee of one rupee, and the Registrar or Assistant Registrar, as the case may be, shall grant certificates of incorporation of any company on the payment of three rupees a copy, and copies or extracts of any other document on payment of a fee of two annas for each hundred words of such copy or extract.

5. The certificates and copies or extracts of the documents referred to in the preceding regulations, shall be granted on plain paper.

6. Certificates of incorporation granted to companies under S. 18, of the Act, shall be in the form, Appendix I, certificates of incorporation granted to individuals under S. 190, cl. 5 of the Act, shall be in the form, Appendix II. Certificates of incorporation of existing companies granted to companies under S. 205 of the Act shall be in the form, Appendix III.

No. 193, dated
16th April, 1868.

7. All fees levied under the provisions of the Act, shall be carried to the credit of Government.

8. The records relating to Joint-Stock Company situated in the North-Western Provinces, which have up to this date been filed and registered in the office of the Registrar of Joint-Stock Companies, Calcutta, have been transferred to the office of the Registrar North-Western Provinces, at Allahabad. All subsequent filings and registrations relating to such Companies, shall consequently be effected at the latter office.

FORM NO. I.

In the office of the Registrar of Joint-Stock Companies, North-Western Provinces.

In the matter of I do hereby certify that pursuant to part I, Act X of 1866, of the Legislative Council of India, entitled “the Indian Companies Act,” memorandum of Association has been this day filed and registered in my office, and that the said company has been duly incorporated and is (a company limited by shares), (guarantee), (an unlimited company), pursuant to the provisions of the said Act. Dated this day of one thousand-eight-hundred , at Allahabad.

2.—“The Local Government....regulations”—(Continued).

VIII.—United Provinces—(Continued).

Memo of fees.

						Rs. A. P.
For registering the company
„ articles of association
„ certificates	5 0 0
					
					Total

Registrar of Joint-Stock Companies, N. W. Provinces.

FORM NO. II.

In the office of the Registrar of Joint-Stock Companies, N.-W. Provinces.

In the matter of , I do hereby certify that pursuant to Act X of 1866 of the Legislative Council of India, entitled “the Indian Companies Act,” the said company has been duly incorporated, and is (a company limited by shares), (guarantee), (an unlimited (company) pursuant to the provisions of the said Act. Dated this day of one thousand-eight-hundred , at Allahabad.

Memo of Fees.

For certificate

Rs. A. P.
... 3 0 0

Registrar of Joint-Stock Companies, N.W. Provinces.

FORM NO. III.

In the office of the Registrar of Joint-Stock Companies, N.-W. Provinces.

In the matter of , I do hereby certify that pursuant to part VII of Act X of 1866 of the Legislative Council of India, entitled “the Indian Companies’ Act” has been this day filed and registered in my office, and that the said company has been duly incorporated and is (a Company Limited by shares), (guarantee), (an unlimited company) pursuant to the provisions of the said Act. Dated this day of one thousand eight-hundred , at Allahabad.

Memo of Fees.

						RS. A. P.
For registering the company
For list of share-holders
Copy of Act of Parliament
Act of Governor-General of India in Council
„ Royal Charter
„ Letters Patent
„ Deed of Settlement
„ Contract of co-partnery
„ Statement of nominal capital, number of shares, &c.
„ Resolution declaring amount of guarantee, for certificate	5 0 0
					
					Total

2.—“*The Local Government . . . regulations*”—(Concluded).

VIII.—United Provinces—(Concluded).

Registrar of Joint-Stock Companies, N.W. Provinces.

His Honor the Lieutenant-Governor and Chief Commissioner, is pleased to declare that the Registrar of Joint-Stock Companies under Act X of No. 441-A, dated 1866 for the North-Western Provinces, shall also be Registrar 24th July, 1877. of Joint-Stock Companies for the Province of Oudh.

3.—“*The Local Government may from time to time determine places.*”

Instances of notification issued under this clause and cl. (a).

For — See Mad. R. and O. and U. P. R. and O.

Y-1

4.—“*The Local Government may direct.*”

Notification.

For —, declaring in the case of Burma that the fees to be levied under this clause shall be the maximum fees allowed by this section, See, Bur. R. M. Burma Gazette, 1907, Pt. I, p. 136. Z

PART VI.

APPLICATION OF ACT TO COMPANIES REGISTERED UNDER THE JOINT-STOCK COMPANIES ACTS.

221. Subject as hereinafter mentioned, this Act, with the exception of Table A in the first schedule, shall apply to companies formed and registered under Act No. XIX of 1857 and Act No. VII of 1860¹ or either of them, in the same manner, in the case of a limited company, as if such company had been formed and registered under this Act as a company limited by shares, and, in the case of a company other than a limited company, as if such company had been formed and registered as an unlimited company under this Act; with this qualification that, wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Acts or either of them, and the power of altering regulations by special resolution given by this Act shall, in the case of any company formed and registered under the said Acts or either of them, extend to altering any provisions contained in the table marked B² annexed to Act No. XIX of 1857, and shall also, in the case of an unlimited company formed and registered as last aforesaid, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that such regulations are contained in the memorandum of association.

Application of Act to Companies formed under Act XIX of 1857 or VII of 1860.

(Notes.)

Corresponding English Law.

Cf., S. 245 of the English Companies (Consolidated Act, 1908).

A

1.—“Act No. XIX of 1857 and Act No. VII of 1860.”

Legislative change.

Act XIX of 1857 and Act VII of 1860 were repealed by Act X of 1866, S. 219.B

2.—“Table marked B.”

Table B in the Schedule to Act XIX of 1857.

—however, remains in force (see S. 2, *supra* and is given, *infra*), Appendix 1.

222. This Act shall apply to Companies registered but not formed under the said Acts or either of them, in the same manner as it is hereinafter declared to apply to Companies registered but not formed under this Act; with this qualification, that, wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such Companies were respectively registered under the said Acts or either of them.

Application of Act to Companies registered under Act XIX of 1857 or VII of 1860.

(Note).

Corresponding English Law.

This section corresponds to S. 246 of the English Companies (Consolidated Act, 1908).

C

223. Any Company registered under the said Acts or either of them may cause its shares to be transferred in manner hitherto in use, or in such other manner as the Company may direct.

Mode of transferring shares.

(Note).

Corresponding English Law.

This section corresponds to S. 248 of the English Companies Act (Consolidated Act, 1908).

D

PART VII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

224. With the exceptions made in the next following section, and subject to the regulations therein contained, every Company, existing at the time of the commencement of this Act, including any Company¹ registered under either of the said Acts, consisting of seven or more members, and any Company hereafter formed in pursuance of any Act of Parliament or Act of the Governor General

Companies capable of being registered.

in Council other than this Act, or of Letters Patent, or being otherwise duly constituted by law² and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited Company, or a Company limited by shares, or a Company limited by guarantee, and no such registration shall be invalid by reason that it has taken place with a view to the Company being wound up.

(Notes.)

Corresponding English Law.

This section corresponds to Para I of S. 249 of the English Companies (Consolidation) Act, 1908. E

1.—“Company.”

Registration subsequent to the presentation of a winding-up petition.

—————must be a mere nullity. *Hercules Insurance Co.*, 11 Eq., 321. F

1.—“Duly constituted by law.”

(1) “Duly constituted by law”—Meaning.

“It is difficult to say what is the meaning of the words “duly constituted by law.”

“The law does not constitute any company of any kind.”

“It recognizes different procedures according to which Companies may be constituted, and probably the words must read “duly constituted according to law”. Buckley on the Companies Consolidation Act, 1908, p. 532.

Semble.—the effect of the words is that the “company” here spoken of is a company, constituted in some manner analogous to those which the section mentions before, viz., by registration under some Act of Parliament, or in pursuance of an Act of Parliament or under Letters Patent, (1891) 2 Q.B. 612. G

(2) Partnership incorporated for being wound up.

A partnership formed not for carrying on a business, but simply for the purpose of being incorporated under this Act in order that it may forthwith be wound up, is not within this section. *Reg. v. Registrar of Joint-Stock Cos.*, *E. P. Johnston*, 1891, 2 Q.B. 598. H

(3) Registration—Effect.

By registration under the Act a company may acquire powers which it had not before. This section expressly provides that registration shall not be invalid by reason that it has taken place with a view to winding-up, and thus a company, which has no power of selling and transferring its business, may by registration followed by voluntary liquidation acquire the power of sale given by S. 192. (Ss. 204—211, *supra*.) *Southall v. British Mutual Society*, 6 Ch. 614. I

Regulations as to registration of existing Companies.

225. The following regulations shall be observed with respect to the registration of Companies under this Part of this Act (that is to say):—

- (a) No Company having the liability of its members limited by Act of Parliament or Act of the Governor General in Council other than this Act, or by Letters Patent, and not being a Joint-Stock Company as hereinafter defined, shall register under this Act in pursuance of this Part thereof :
- (b) No Company having the liability of its members limited by Act of Parliament or Act of the Governor General in Council other than this Act, or by Letters Patent, shall register under this Act in pursuance of this Part thereof as an unlimited Company, or as a Company limited by guarantee :
- (c) No Life Assurance Company existing at the time of the commencement of this Act, and no Company that is not a Joint-Stock Company as hereinafter defined, shall in pursuance of this Part of this Act register under this Act as a Company limited by shares :
- (d) No Company shall register under this Act in pursuance of this Part thereof unless an assent to its so registering is given by a majority of such of its members as may be present personally, or by a proxy in cases where proxies are allowed by the regulations of the Company, at some general meeting summoned for the purpose :
- (e) Where a Company, not having the liability of members limited by Act of Parliament, or Act of the Governor General in Council, or by Letters Patent, is about to register as a limited Company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present personally or by proxy, at such last-mentioned general meeting :
- (f) Where a Company is about to register as a Company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the Company, in the event of the same being wound up during the time that he is a member or within one year afterwards, for payment of the debts and liabilities of the Company contracted before the time at which he ceased to be a member, and of the costs, charges

and expenses of winding-up the Company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding a specified amount.

In computing any majority under this section, when a poll¹ is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the Company of which he is a member.

(Notes).

Corresponding English Law.

This section corresponds to S. 249 (2) (3) of the English Companies (Consolidation) Act, 1908. J

1.—“Poll.”

Poll not demanded—Voting.

If a poll is not demanded the voting will be by show of hands, not counting shares. *Horbury Bridge Co.*, 11 Ch. D. 109, *Cf.*, *Ernest v. Loma Mines*, 1896, 2 Ch. 572; (1897) 1 Ch. 1. J-1

226. For the purposes of this Part of this Act, so far as the same relates to the description of Companies empowered to register as Companies limited by shares, a Joint-Stock Companies shall be deemed to be a Company having a permanent paid up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons; and such Company, when registered with limited liability under this Act, shall be deemed to be a Company limited by shares.

Definition of
“Joint-Stock
Company.”

(Note).

Corresponding English Law.

DEFINITION OF JOINT-STOCK COMPANY.

For the purposes of this Part of this Act, as far as relates to registration of companies as companies limited by shares, a Joint-Stock Company means a company having a permanent paid-up or nominal share capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company when registered with limited liability under this Act shall be deemed to be a company limited by shares. S. 250 of the English Companies (Consolidation) Act, 1908. K

Requisitions for
registration by Com-
panies.

227. Previously to the registration, in pursuance of this Part of this Act, of any Joint-Stock Company, there shall be delivered to the Registrar the following documents (that is to say) :—

- (a) A list showing the names, addresses and occupations of all persons who, on a day named in such list and not being more than six clear days before the day of registration, were members of such Company, with the addition of the shares held by such persons respectively, distinguishing, in cases where such shares are numbered, each share by its number :
- (b) A copy of any Act of Parliament or Act of the Governor General in Council, Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the Company :
- (c) If any such Joint-Stock Company is intended to be registered as a limited Company, the above list and copy shall be accompanied by a statement specifying the following particulars (that is to say) :—
the nominal capital of the Company and the number of shares into which it is divided ;
the number of shares taken and the amount paid on each share ;
the name of the Company, with the addition of the word “ limited ” as the last word thereof ;
with the addition, in the case of a Company intended to be registered as a Company limited by guarantee, of the resolution declaring the amount of the guarantee.

(Note).

Corresponding English Law.

This section almost corresponds to S. 252 of the English Companies (Consolidation) Act, 1908. L

Requisitions for
registration by exist-
ing Company not
being a Joint-Stock
Company.

228. Previously to the registration in pursuance of this Part of this Act of any Company not being a Joint-Stock Company, there shall be delivered to the Registrar a list showing the names, addresses and occupations of the directors or other managers (if any) of the Company, also a copy of any Act of Parliament, Act of the Governor General in Council, Letters Patent,

deed of settlement, contract of co-partnery or other instrument constituting or regulating the Company, with the addition, in the case of a Company intended to be registered as a Company limited by guarantee, of the resolution declaring the amount of the guarantee.

(Note).

Corresponding English Law.

This section is similar to S. 253 of the English Companies (Consolidation) Act, 1908. M

229. Where a Joint-Stock Company authorised to register under this Act has had the whole or any portion of its capital converted into stock, such Company shall, as to the capital so converted, instead of delivering to the Registrar a statement of shares deliver to the Registrar a statement of the amount of stock belonging to the Company, and the names of the persons who were holders of such stock, on some day to be named in the statement, not more than six clear days before the day of registration.

Power for existing Company to register amount of stock instead of shares.

230. The list of members and directors and any other particulars relating to the Company hereby required to be delivered to the Registrar shall be verified by declaration of the directors of the Company delivering the same, or any two of them, or of any two other principal officers of the Company, made before a Justice of the Peace or a District Judge.

Authentication of statements of existing Companies.

(Note).

Corresponding English Law.

The lists of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be verified by a statutory declaration of any two or more directors or other principal officers of the company. [S. 254 of the English Companies (Consolidation) Act, 1908.] N

231. The Registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing Company is or not a Joint-Stock Company as hereinbefore defined.

Registrar may require evidence as to nature of company.

(Note).

Corresponding English Law.

This section is similar to S. 255 of the English Companies (Consolidation) Act, 1908, with this difference, that in the English enactment, for the expression "an existing company," we have the expression "any Company proposing to be registered," O

232. Every banking Company existing at the date of the passing of this Act which registers itself as a limited Company shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person

On registration of banking Company with limited liability, notice to be given to customers.

and partnership firm having a banking account with the Company.

Such notice shall be given either by delivering the same to such person or firm, or leaving the same, or putting the same into the post addressed to him or them, at such address as shall have been last communicated or otherwise become known as his or their address to or by the Company.

In case the Company omits to give any such notice as is hereinbefore required to be given, then, as between the Company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation.

(Note).

Corresponding English Law.

Where a banking company which was in existence on the seventh day of August eighteen hundred and sixty-two proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him, or by posting it to him at, or delivering of the notice to him, or by posting it to him at, or delivering it at, his last known address.

If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given, but not further or otherwise, the certificate of registration with limited liability shall have no operation. [S. 256, of the English Companies (Consolidation) Act, 1908.] **P**

233. No fees shall be charged in respect of the registration in pursuance of this Part of this Act of any Company

Exemption of certain Companies from payment of fees.

in cases where such Company is not registered as a limited Company, or where, previously to its being registered as a limited Company, the liability of the shareholders was limited by some Act of Parliament, or Act of the Governor General in Council, or by Letters Patent.

(Note).

Corresponding English Law.

This section corresponds to S. 257 of the English Companies (Consolidation) Act, 1908. Q

234. Any Company authorised by this Part of this Act to register with limited liability shall, for the purpose of obtaining registration with limited liability, change its name by adding thereto the word "limited".

(Notes).

Corresponding English Law.

When a company registers in pursuance of this Part of this Act with limited liability, the word "limited" shall form and be registered as part of its name. [S. 258 of the English Companies (Consolidation) Act, 1908]. R

1.—"Limited."**Resolution to add "Limited," erroneous.**

The word "limited" is, it is conceived, added to the Company's name by virtue of this section, and the course (not infrequently taken) of including in the resolution to register a resolution to add "limited" to the name is, it is conceived, erroneous. Buckley on the Companies Consolidation Act, 1908, p. 535. S

235. Upon compliance with the requisitions in this Part of this Act contained with respect to registration, and on payment of such fees, if any, as are payable under the tables marked B and C in the first schedule hereto, the Registrar shall certify under his hand that the Company so applying for registration is incorporated ¹ as a Company under this Act, and in the case as a limited Company that it is limited; and thereupon such Company shall be incorporated, and shall have perpetual succession and a common seal.

(Notes).

Corresponding English Law.

This section is similar to S. 259 of the Companies (Consolidation) Act, 1908: but the following words:—"with power to hold lands; and any banking company in Scotland so incorporated shall be deemed to be a bank incorporated, constituted, or established by or under Act of Parliament," found at the end of S. 259 of the English Enactment, after the words "common seal" are not to be found in the present section. T

1.—"Incorporated."

See G. Newan & Co., 1895, 1 Ch. 674, 685. U

236. A certificate of incorporation given at any time to any Company registered in pursuance of this Part of this Act shall be conclusive evidence that all the requisitions herein contained in respect of registration under this Act have been complied with, and that the

Certificate to be evidence of compliance with Act.

Company is authorised to be registered under this Act as a limited or unlimited Company, as the case may be; and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the Company is incorporated under this Act.

237. All such property, moveable and immoveable, including
 Transfer of pro- all interests and rights in, to and out of property,
 perty to Company. moveable and immoveable, and including obligations and actionable claims, as may belong to or be vested in the Company at the date of its registration under this Act, shall, on registration, pass to and vest in the Company as incorporated under this Act for all the estate and interest of the Company therein.

(Note).

Corresponding English Law.

VESTING OF PROPERTY ON REGISTRATION.

All property, real and personal (including things in action), belonging to or vested in a company at the date of its registration in pursuance of this Part of this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein. [S. 260, of the English Companies (Consolidation) Act, 1908.] **V**

238. The registration in pursuance of this Part of this Act of
 any Company shall not affect or prejudice the liability of such Company to have enforced against it, or its right to enforce, any debt or obligation incurred, or any contract entered into, by, to, with or on behalf of, such Company previously to such registration.
 Registration under this Act not to affect obligations incurred previously to registration¹.

(Notes).

Corresponding English Law.

This section almost corresponds to S. 261 of the English Companies (Consolidation) Act, 1908. **W**

I.—“Registration....registration.”

Liability of contributory.

This section has no application to the case of a pure contributory. The right of contribution is founded on the contract of partnership; and if a previously unlimited company has been registered with limited liability, the contract is one which excludes all liability to contribute beyond the amount of the share. *Sheffield and Hallamshire, etc. Society*, *Fountain's* case, 4 D. I. & S. 699; 6 N.R. 75; 11 Jur. (N.S.) 553; 13 W.R. 667; 34 L.J. (Ch.) 593; 12 L. T. 335. **X**

The result of this has been said to be that if an unlimited company is registered with limited liability and is subsequently wound up, persons who were members of the unlimited company cannot, even in respect of debts contracted before the registration with limited liability, be

1. — "Registration....registration"—(Concludea).

called upon to contribution beyond the limit of their shares. [*Sheffield and Hallamshire, &c., Society, Fountain's case*, 4 D.J. & S. 699; 6 N.R. 75; 11 Jur. (N.S.) 553; 13 W.R. 667; 34 L.J. (Ch.). 593; 12 L. T. 395.]

Y

In any case *quære* whether the rights of creditors as distinguished from the right of contribution as between the members *inter se* could not be enforced in some other proceeding than the winding-up. Buckley's Companies Consolidation Act, 1908, p. 536.

Z

Where under the policies of an unregistered assurance society the assets of the company alone were liable, and the society being insolvent was registered as an unlimited company and immediately afterwards wound up, it was held that there was no liability beyond the amount of the shares for any breach of contract in ceasing to carry on business; for the policy-holders were bound by their contract, and could not make the share-holders liable beyond the expressed contract of limited liability. *Lethbridge v. Adams*, 13 Eq. 547.

A

239. All such suits and other legal proceedings as may at the time of the registration of any Company registered in pursuance of this Part of this Act have been commenced by or against such Company or the public officer or any member thereof may be continued in the same manner as if such registration had not taken place. Nevertheless, execution shall not issue against the effects of any individual member of such Company upon any decree or order obtained in any suit or proceeding so commenced as aforesaid; but, in the event of the property and effects of the Company being insufficient to satisfy such decree or order, an order may be obtained for winding-up the Company.

Continuation of existing suits.

(Notes).

(1) Corresponding English Law.

This section is similar to S. 262 of the English Companies (Consolidation) Act, 1908.

(2) Liability of contributory.

B

A share-holder in an unregistered Company which, after he has parted with all his shares, is registered, is not a contributory of the registered company, for he never was a member of it, but he remains liable for all debts incurred by the unregistered Company while he was a share-holder in it. *Lanyon v. Smith*, 3 B. & Sm. 998; 2 N. R. 118; *Harvey v. Clough*, 2 N. R. 204.

C

240. When a Company is registered under this Act in pursuance of this Part thereof, all provisions contained in any Act of Parliament, Act of the Governor General in Council, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or

Effect of registration under Act.

regulating the Company, including, in the case of a Company registered as a Company limited by guarantee, the resolution declaring the amount to guarantee, shall be deemed to be conditions and regulations of the Company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this Act shall apply to such Company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject to the provisions following (that is to say) :—

- (a) That table A in the first schedule to this Act shall not, unless adopted by special resolution, apply to any Company registered under this Act in pursuance of this Part thereof :
- (b) That the provisions of this Act relating to the numbering of shares shall not apply to any Joint-Stock Company whose shares are not numbered :
- (c) That no Company shall have power to alter any provisions contained in any Act of Parliament, Act of the Legislative Council or Act of the Governor General in Council relating to the Company :
- (d) That no Company shall have power, without the sanction of the Governor General in Council, to alter any provision contained in any Letters Patent relating to the Company :
- (e) ¹ In the event of the Company being wound up, every person shall be a contributory in respect of the debts and liabilities of the Company contracted prior to registration, who is liable to pay or contribute to the payment of any debt or liability of the Company contracted prior to registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves in respect of any such debt or liability, or to pay or contribute to the payment of the costs, charges and expenses of winding-up the Company, so far as relates to such debts or liabilities as aforesaid. Every such contributory shall be liable to contribute to the assets of the Company, in the course of the winding-up, all sums due from him in respect of any such liability as aforesaid. In the event of the death

or insolvency of any such contributory as last aforesaid, the provisions hereinbefore contained with respect to the representatives, heirs and devisees of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply :

- (f) Nothing herein contained shall authorise any Company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the Company, as would, if such Company had originally been formed under this Act, have been contained in the memorandum of association, and are not authorised to be altered by this Act :

But nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any Company registering under this Act in pursuance of this Part thereof by virtue of any Act of Parliament, Act of the Governor General in Council, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the Company ².

(Notes).

Corresponding English Law.

Cf., S. 263 (i), (ii) (a), (b), (c), (d), (f), (iv), (v) of the Companies (Consolidation) Act, 1908 with this section. D

1—"S. 240 (e)."

Contributories—Past members.

It will be observed that, as respects debts contracted prior to registration, subsection (e) contains nothing similar to the provision of Ss. 61, 62, *supra*, exonerating past members who have ceased to be members for more than a year from liability in respect of debts contracted before they left the company. Buckley's Companies Consolidation Act, 1908, p. 539. E

2—"Nothing....Company."

Scope of the clause.

This clause must be read as continuing to the Company "any lawful power of altering, etc.," any power which can be exercised consistently with justice and with the objects of the Act. *Droitwich Salt Co. v. Curzon*, L.R. Ex. 35. F

- 241.** The Court may, at any time after the presentation of a petition for winding-up a Company registered in pursuance of this Part of this Act, and before making an order for winding-up the Company, upon the application of any creditor of the Company, restrain further

Power of Court to restrain further proceedings.

proceedings in any suit or legal proceeding against any contributory of the Company as well as against the Company as hereinbefore provided, upon such terms as the Court thinks fit.

(Note).

Corresponding English Law.

The provisions of this Act with respect to staying and restraining actions and proceedings against a Company at any time after the presentation of a petition for winding-up and before the making of a winding-up order shall, in the case of a Company registered in pursuance of this Part of this Act, where the application to stay or restrain is by a creditor, extend to actions and proceedings against any contributory of the Company. S. 265 of the English Companies (Consolidation) Act, 1908. G

For Notes, see case noted under S. 134, *supra*, at pp. 303—313, *supra*.

242. Where an order has been made for winding-up a Company registered in pursuance of this Part of this Act, in addition to the provisions hereinbefore contained, it is hereby further provided that no suit or other legal proceeding shall be commenced or proceeded with against any contributory of the Company in respect of any debt of the Company, except with the leave of the Court and subject to such terms as the Court may impose.

Order for winding-up Company.

(Note).

Corresponding English Law.

This section is almost similar to S. 266 of the English Companies (Consolidation) Act, 1908.

For Notes, see cases noted under S. 136, *supra*, at pp. 321—326, *supra*. H

PART VIII.

APPLICATION OF ACT TO UNREGISTERED COMPANIES.

243. Subject as hereinafter mentioned, any Partnership, Association¹ or Company, except Railway Companies², incorporated by Act of Parliament or Act of the Governor-General in Council, consisting of more than seven members³ and not registered under this Act, and hereinafter included under the term “unregistered Company⁴,” may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such Company, with the following exceptions and additions:—

Winding-up un-registered Companies⁵.

1. An unregistered Company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of British India where its principal place of business is situate, or, if it has a principal place

of business situate in more than one part of British India, then in each part of British India where it has a principal place of business. Moreover the principal place of business of an unregistered Company, or (where it has a principal place of business situate in more than one part of British India) such one of its principal places of business as is situate in that part of British India in which proceedings are being instituted, shall, for all the purposes of the winding-up of such Company, be deemed to be the registered office of the Company.*

2. No unregistered Company shall be wound up under this Act voluntarily, or subject to the supervision of the Court :

3. The circumstances under which an unregistered Company may be wound up are as follows (that is to say) :—

- (a) whenever the Company is dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs ;
- (b) whenever the Company is unable to pay its debts ;
- (c) whenever the Court is of opinion that it is just and equitable that the Company should be wound up :

4. An unregistered Company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

- (a) whenever a creditor to whom the Company is indebted, by assignment or otherwise, in a sum exceeding five hundred rupees then due, has served on the Company, by leaving the same at the principal place of business of the Company or by delivering to the Secretary or some director or principal officer of the Company, or by otherwise serving the same in such manner as the Court may approve or direct, a demand under his hand requiring the Company to pay the sum so due, and the Company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor :
- (b) whenever any suit or other proceeding has been instituted against any member of the Company for any debt or demand due or claimed to be due from the Company, or from him in his character of member of the Company, and notice in writing of the institution of such

suit or other legal proceeding having been served upon the Company by leaving the same at the principal place of business of the Company, or by delivering it to the secretary or some director, manager or principal officer of the Company, or by otherwise serving the same in such manner as the Court may approve or direct, the Company has not, within ten days after service of such notice, paid, secured or compounded for such debt or demand, or procured such suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same :

- (c) whenever execution or other process issued on a decree or order obtained in any Court in favour of any creditor in any proceeding instituted by such creditor against the Company, or any member thereof as such or against any person authorised to be sued as nominal defendant on behalf of the Company, is returned unsatisfied :
- (d) whenever it is otherwise proved to the satisfaction of the Court that the Company is unable to pay its debts.

(Notes).

Corresponding English Law.

Cf. S. 268 (1) (i) (ii) (iii) (iv) (a) (b) (c) (e) of the English Companies (Consolidation) Act, 1908, with this section. I

1.—“Association.”

(1) Scope of the section.

This section only applies to trading associations. *Bristol Athenæum*, 43 C.D. 286. J

(2) Association—Scope of the term.

- (a) “Association,” if denoting something different from a Company or partnership, must mean something where the associates are in the nature of partners. *Smith v. Anderson*, 15 C.D. 247. K
- (b) It includes the case of four firms, containing more than seven, but less than twenty members, associated in a trading adventure. *Adansonie Fibre Co.*, 9 Ch. 637 (n). L
- (c) Also the case of subscribers for the purchase of property, for sale to a Company to be formed at a profit. *Royal Victoria Theatre*, 30 L.T. 3. M
- (d) Whether or not a partnership or association has been formed is a question of fact, but if more than seven members admit insolvency of an association, an order will be made. *South of France Syndicate*, 36 L.T. 651. N

2.—“*Railway Companies.*”

Railway Companies, exception of, from this section.

- (a) The exception of Railway Companies incorporated by Act of Parliament applies only to Companies whose principal object is the construction of a Railway; a dock Company empowered to make a small branch Railway is not within the exception. *Elmouthe Docks Co.*, 17 Eq. 181. **O**
- (b) Nor a ferry Company. *Isle of Wight Ferry Co.*, 2 H. & M. 597. **P**
- (c) Nor a Tramway Company. *Brentford, &c., Tramways Co.*, 26 Ch. D. 527. **Q**

3.—“*Consisting of more than seven members.*”

- (1) **Reference to seven members means what.**

The reference to seven members means seven at the date of the petition. *Bolton Benefit Loan Society*, 12 C.D. 679. **R**

- (2) “**Members**”—**Meaning.**

- (a) The word “members” does not necessarily mean “share-holders.” *South London Fish Market*, 39 C. D. 324. **S**
- (b) One must look at the constitution of each particular Company to see what constitutes membership. *Re Bowling and Welby*, (1895) 1 Ch. 663. **T**
- (c) Representatives of deceased members, trustees of bankrupt members, and past members, although liable to contribute to the debts of the Company, are not members within the section. *Re Bowling and Welby*, (1895) 1 Ch. 663. **U**
- (d) An order, if made improperly (*e.g.*, if less than seven members), is not binding on strangers. (*Ibid.*) **V**

4.—“*Unregistered Company.*”

- (1) “**Unregistered**”—**Meaning.**

“Unregistered” means not registered under the Companies Act. **W**

- (2) “**Unregistered Company**,” **meaning of.**

By an unregistered Company is meant one which is unregistered at the date of the commencement of the winding-up. Registration subsequent to the presentation of a winding-up petition is a nullity. *Hercules Insurance Co.*, 11 Eq. 321. **X**

The meaning to be attached to the term “unregistered Company” in this section has been the subject of conflicting *dicta*. See *Torquay Bath Co.*, 32 Beav. 581; *Bowes v. Hope &c., Insurance Society*, 11 H.L.C. 389; *London India Rubber Co.*, 1 Ch. 329; *Bank of London, &c., Association*, 6 Ch. 421. **Y**

It was, however, decided that a Company registered under the Joint-Stock Companies Act was not an unregistered Company. *London India Rubber Co.*, 1 Ch. 329, notwithstanding *Bowes v. Hope Society*, 11 H.L.C. 389. **Z**

5.—“*Winding-up unregistered Companies.*”

- (1) **Companies illegal from want of registration.**

A Company which ought to be, but is not registered under the Act, is an illegal association: no member who was *particeps criminis* could, it is conceived, avail himself of the provisions of the Act to wind up a concern whose existence is in defiance of the law. Buckley on Companies, 9th Ed., p. 546. **A**

Whether such a company could be wound up upon the petition of a *bona fide*, creditor, or even in some cases upon that of a contributory. (*Ibid.*) **A-1**

5.—“Winding-up unregistered Companies”—(Continued).

(2) Unincorporated Companies not registered under any Act.

Unincorporated Companies which have never been registered under any Act are included in the term “unregistered Companies,” and may be wound up under this section. (*Ibid.*) **B**

EXAMPLE.

Thus, where an unregistered Company had been dissolved by resolutions passed pursuant to the deed of settlement, its place of business abandoned, and its assets and liabilities transferred to another Company, before the passing of this Act, the Company was within the Act; and so long as anything remained to be done to wind it up, either as regarded the parties *inter se*, or the creditors of the company, it was carrying on business for the purpose of winding-up its affairs, and a winding-up order was made. *Family Endowment Society*, 5 Ch. 118. **C**

(3) Society in the nature of an unregistered friendly society.

A—may be wound-up in an action. *Lead Co.'s Fund*, (1904), 2 Ch. 196. **C-1**

(4) Associations which cannot be wound up.

(a) A corporation existing from time immemorial, and holding an exclusive right of fishing, on trust for the individual members and which could not be sold, cannot be wound up. *Free Fishermen of Faversham*, 36 C.D. 329. **D**

(b) So also an ordinary club. *St. James's Club*, 2 De G.M. & G. 383. **E**

(c) A Company which is to be formed on certain terms and under certain conditions, but which has in fact never been formed, cannot be wound up as an “unregistered Company,” because preliminary expenses have been incurred; and, *quære*, whether provisional directors can, by acting under the name of the company, be so associated as to form a body capable of being wound up. *Imperial Anglo-German Bank*, 25.F

(d) Having regard to sub-S. (i) which speaks of the “place of business” of the unregistered Company, it must be a trading company to fall within the section. Accordingly an order has been refused in the case of a literary and scientific institution not established for the purpose of gain. *Bristol Athenaeum*, 43 Ch. D. 236; but see *Figgins v. Baghino*, (1898), 2 Ch. 72; *Re Jones, Clegg v. Ellison*, (1898), 2 Ch. 83. **G**

(5) Unregistered Company—Petition for a winding-up order—Solvency of Company—Company not taking up new business—Ground for winding-up—Difference of opinion among share-holders—Winding-up against the wishes of the minority.

Under this section, the Court can, in the case of an unregistered society, make a winding-up order only (1) when the Company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs; (2) when the Company is unable to pay its debts; and (3) when the Court is of opinion that it is just and equitable that the Company should be wound up. 2 Ind. Cas. 164. **H**

Where an unregistered society has large outstandings which it would take years to work out and is not insolvent, the mere fact that it has ceased to take new business cannot be construed as carrying on business for the purpose of winding-up its affairs and would not, on that ground only, justify a winding-up order by the Court. (*Ibid.*) **I**

5.—“Winding-up unregistered Companies”—(Concluded).

The fact that an unregistered Company is carrying on its business “as a sealed series,” will not justify a winding-up order if the Company is solvent and there is nothing to indicate that the liabilities of the Company will not be duly met. (*Ibid.*) J

So long as a society, formed for the mutual assurance of lives, is solvent and is in a position to do all that it has undertaken to do, it will not be just or equitable, even if it were the wish of the majority of the share-holders, to wind it up against the wishes of the minority. (*Ibid.*) K

244. In the event of an unregistered Company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the Company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs², charges and expenses of winding-up the Company.

Every such contributory shall be liable to contribute to the assets of the Company in the course of the winding-up all sums due from him in respect of any such liability as aforesaid.

In the event of the death³ or insolvency of any contributory, the provisions hereinbefore contained with respect to the personal representatives, heirs and devisees of a deceased contributory, and to the assignees of an insolvent contributory, shall apply.

(Notes).

Corresponding English Law.

The first para of sub-S. (1) of S. 269 of the English Companies (Consolidation) Act, 1908, corresponds to the first two paras of this section. Sub-S. (2) of that section corresponds to the last para of this section.

That sub-section runs thus:—“In the event of the death, bankruptcy, or insolvency, of any contributory, or marriage of any female contributory, the provisions of this Act with respect to the personal representatives, heirs, and devisees of deceased contributories, to the trustees of bankrupt or insolvent contributories and to the liabilities of husbands and wives respectively, shall apply.” L

1.—“Who to be deemed a contributory....wound up.”

(1) Contributories in winding-up unregistered Company.

(a) “Liable to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves”———These words intend a legal or equitable liability to contribute as partner: they do not include a mere debtor. *Lee and Moor's case*, 5 Eq. 368. M

1.—“Who to be deemed a contributory...wound up”—(Continued).

- (b) Thus the mortgagee of a ship, insured in a mutual insurance society who, as mortgagee, had, in accordance with the rules, given a guarantee for payment of contributions and averages in respect of the ship, was not a contributory. *Lee and Moor's case*, 5 Eq. 368. **M-1**
- (c) So a transferor of shares when calls were in arrear was not on this account a contributory. *E. P. Littledale*, 9 Ch. 257. **N**
- (d) So a member of an unregistered Company which is a corporation (e.g., a building society under the English Building Societies Act, 1874) is not either at law or in equity liable to contribute to payment of the Company's debts. The corporation, not the member, is debtor. *Sheffield Building Society*, 22 Q.B.D. 470. **O**
- He is liable, of course, to contribute to the corporate fund according to his liability as a member of the corporation.
- (e) So a debtor to the Company, or a *cestui qui trust* of shares in the Company, or an officer of the Company who has misappropriated its assets, may each be compellable to pay moneys which will be assets of the Company, but they are not contributories. *British National Association*, 8 Ch. Div. 679, 708. **P**

(2) Misrepresentation by promoters.

But the liability of one of the partners to make good such a misrepresentation as that in *Rawlins v. Wickham*, 3 De G. and J. 304 is a liability for which he may be made answerable as a contributory. **P-1**

EXAMPLE.

Thus, where two promoters issued a circular stating that the entire cost of the operation for which the Company was to be formed would be £12,000, “and of this sum £5,000 only remain for subscription,” they were contributories to the amount of £7,000, or so much of that sum as they failed to shew had been subscribed by other persons. *Moore and De la Torre's case*, 18 Eq. 661.

Although a statement by directors that they intend to take certain shares is not of itself an agreement to do so. *Moore Brothers*, (1899), 1 Ch. 627. **Q**

(3) Nominee *bona fide*.

“Liable to pay or contribute”....—these words did not include persons who on purchasing shares have *bona fide* had them transferred to, and registered in the name of, a nominee. *King's case*, 6 Ch. 196: *Contract Cox's case*, 4 D.J. and S. 53; 33 L. J. (Ch.) 145; 12 W.R. 92; 3 N.R. 97. **R**

(4) Mutual Insurance Society.

(a) Where S had agreed in writing to become a member of a Marine Mutual Insurance Society, and had contributed to the losses of other members, and made a claim in respect of injury sustained by his own ship, but no stamped policy had ever been executed, it was held that in the absence of a duly stamped agreement for insurance there was not evidence of a binding mutual contract for insurance, and that S was not a contributory. *Smith's case*, 4 Ch. 611. **S**

(b) But where B and Co., by letter authorized the managers of such a society to insure a ship with the society, and undertook to abide by the rules, and a duly stamped policy containing, however, no reference to the

1.—“Who to be deemed a contributory....wound up”—(Concluded).

rules, was issued to them, it was held that the letter, though unstamped was admissible in evidence, that the letter and policy together constituted a binding agreement, and that B and Co. were contributories. *Blyth and Co.'s case*, 13 Eq. 529. T

- (c) In a society of this kind the winding-up order does not displace or alter the terms of the contract between the parties. *London Marine Insurance Association*, 8 Eq. 176. U

(5) Proof on an unstamped policy.

Where no stamped policy had been issued, but, the ship having been lost, the validity of the claim had been admitted before the winding-up, as was shown by (*inter alia*) entries in the Company's books, proof was allowed in the winding-up. *Martin's claim*, 14 Eq. 148. Y

2.—“Costs.”

Costs of winding-up.

- (a) It is conceived that costs of winding-up must be borne in proportion to the members' interest in the assets or liability to the debts of the association. *Preece and Evan's case*, 2 D.M. & G. 374; *London Marine Insurance Association*, 8 Eq. 175. W
- (b) In an Insurance Company whose policies provide that to the policy-holder the funds of the Company shall alone be liable, and no share-holder shall be liable beyond the amount of his shares, the costs of winding-up must be borne by the share-holders, and not paid out of the funds of the Company. *Professional Life Assurance Co.*, 3 Eq. 668; 3 Ch. 167; *Lethbridge v. Adams*, 13 Eq. 547; and see *supra*, p. 399. X
- (c) For the contract with the policy-holder is, that the funds of the Company remaining undisposed of at the time of enforcing the agreement, that is, at the date of winding-up, and inapplicable to prior claims, shall be liable to him. Costs of realization, such as costs of sale, must be deducted; but costs of enforcing payment of calls and the like, that is all general costs of winding-up, must be borne by the share-holders. *Agriculturist Cattle Insurance Co. E.P. Official Manager*, 10 Ch. 1. Y
- (d) Where the liquidator compromises with a contributory for a lump sum, the limited assets available for policy-holders are entitled first to have the amount due to the limited assets satisfied out of the sum received, the unlimited assets available for general creditors or for costs, can take only what is left. See *International Life Assurance Society*, 2 Ch. Div. 476; *Re same Co.*, 36 L.T. 914; *Accidental Death Insurance Company*, 7 Ch. D. 568; noticed *ante* p. 399. Z

3.—“In the event of the death.”

Joint tenants of shares.

If two persons are joint tenants of shares in a Company whose deed of settlement contains a covenant by each share-holder for himself, his heirs, executors, and administrators to satisfy the obligation attaching to the shares, and one of them dies, his executors will in the winding-up be put on the list with the surviving owner, but only in respect of liabilities incurred up to the death of their testator. *Kirby's Executors' case* (Alb. Arb.) Reil. 67; 15 Sol. J. 922. A

245. The Court may, at any time after the making of an application for winding-up an unregistered Company, and before making an order for winding-up the Company, upon the application of any creditor of the Company, restrain further proceedings in any suit or proceeding against any contributory of the Company, or against the Company as hereinbefore provided, upon such terms as the Court thinks fit.

Power of Court to restrain further proceedings.

(Notes).

Corresponding English Law.

This section corresponds to S. 270 of the English Companies (Consolidation) Act, 1908. **B**

N.B.—For notes, see cases noted under S. 134, *supra*, at pp. 302-315, *supra*.

246. Where an order has been made for winding-up an unregistered Company, in addition to the provisions hereinbefore contained in the case of Companies formed under this Act, it is hereby further provided that no suit shall be commenced or proceeded with against any contributory of the Company in respect of any debt of the Company, except with the leave of the Court and subject to such terms as the Court may impose.

Effect of order for winding-up Company.

(Notes).

(1) Corresponding English Law.

This section is exactly similar to S. 271 of the English Companies (Consolidation) Act, 1908. **C**

N.B.—See cases noted under S. 136, *supra* at pp. 321-326, *supra*.

(2) Section—Applicability.

This section only applies to actions brought against contributories as such to enforce payment of a debt of the company. *South of France Pottery Syndicate*, 37 L.T. 260; 25 W.R. 370. **D**

247. If any unregistered Company has no power to sue and be sued in a common name, or if, for any reason, it appears expedient, the Court may, by the order made for winding-up such Company or by any subsequent order, direct that all such property, moveable and immoveable, including all interests, claims and rights in, to and out of property, moveable and immoveable, and including actionable claims, as may belong to or be vested in the Company, or to or in any person or persons on trust for or on behalf of the Company, or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names; and thereupon the same or such part thereof as may be specified in the order

Provision in case of unregistered Company.

shall vest¹ accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names, and after giving such indemnity, as the Court directs, bring or defend any suits or other legal proceedings relating to any property vested in him or them, or any suits or other legal proceedings necessary to be brought or defended for the purposes of effectually winding-up the Company and recovering the property thereof.

(Notes).

Corresponding English Law.

This section corresponds to S. 272 of the English Companies (Consolidation) Act; 1908, which runs thus :—"If an unregistered Company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may by the winding-up order, or by any subsequent order, direct that all or any part of the property, real and personal (including things in action), belonging to the Company, or to trustees on its behalf, is to vest in the liquidator by his official name, and thereupon the property of the part thereof specified in the order shall vest accordingly; and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any action or other legal proceedings relating to that property, or necessary to be brought or defended for the purposes of effectually winding-up the Company and recovering its property. E

1.—"In the order shall vest."

(1) Unregistered Company—Vesting order.

In the case of an unregistered Company, the Court has power to make an order vesting its property in the official liquidator, who may then sue or be sued in his official name, or in such other name as the Court may direct, as the representative of the Company. See *Ebsworth and Tidy's contract*, 42 Ch. D. 23. F

(2) Vesting order, whether, can be obtained *Ex parte*.

A vesting order cannot, except under special circumstances, be obtained *ex parte*. *Albion Mutual Permanent Building Society*, 57 L.J.Ch. 248; but see *infra*.

A vesting order can be obtained on an *ex parte* motion. *Albert Life Assurance Co.*, 18 W.R. 91. But see *supra*.

But the trustee in whom the property is vested may be served. *Britannia Building Society*, 1890, W.N. 170. G

(3) Vesting order, application for.

The application should be made in the name of the Company, and not of the liquidator. *Britannia Building Society*, 68 L.T. 804. H

(4) Vesting order—Effect.

(a) The effect of a vesting order is that the property vests in the official liquidator, not in his personal but in his official character. He does not become personally liable in respect of obligations attaching to the property. *Graham v. Edge*, 20 Q.B.D. 538, 683; *Ebsworth and Tidy's Contract*, 42 Ch. Div. 23, 44. I

1.—“In the order shall vest”—(Concluded).

(b) The liquidator of an unregistered Company may sue in his own name on behalf of the Company in an action against directors for losses caused by their misconduct. *Turquand v. Marshall*, 4 Ch. 376. J

(c) Where an order was made vesting the property in six liquidators a conveyance by two of them operated to pass only two-sixths of the legal estate. *Ebsworth and Tidy's contract*, 42 Ch. Div. 23. K

Where, upon the appointment of several liquidators of an unregistered society, it is declared that two out of six of them might do all acts, etc., required, two liquidators can exercise a power of sale, but all must concur to pass the legal estate. (*Ibid.*) L

248. The provisions made by this Part of this Act with respect to unregistered Companies shall be deemed to be

Provisions of this
Part of Act cumulative.

made in addition to, and not in restriction of, any provisions hereinbefore contained with respect

to winding-up Companies by the Court.

The Court or official liquidator may, in addition to anything contained in this Part of this Act, exercise any powers¹ or do any act in the case of unregistered Companies which might be exercised or done by it or him in winding-up Companies formed under this Act; but an unregistered Company shall not, except in the event of its being wound up², be deemed to be a Company under this Act, and then only to the extent provided by this Part of this Act.

(Notes).

(1) Corresponding English Law.

This section corresponds to S. 273 of the English Companies (Consolidation) Act, 1908, with this difference that in the English enactment for the term ‘Official liquidator’ the term ‘liquidator’ is used. M

(2) Scope of section.

The section renders applicable to unregistered Companies the whole, except as expressly excepted, of Part IV of the Act. N

(3) Court to give due effect to section.

The Court will give to this section its due effect, and will refuse to hold any of the foregoing provisions inapplicable to the case of unregistered Companies, on the ground that this section includes them *per incuriam*. *Buckley*. O

1.—“Exercise any powers.”

Official liquidator allowed to prove against a bankrupt contributory.

The official liquidator will be allowed to prove against a bankrupt contributory, notwithstanding the general rule that joint creditors cannot prove against the separate estate of a partner in competition with separate creditors. *E.P. Ball*, 110 Ch. 48; of the *Muggeridge, Muggeridge v. Sharp*, 10 Eq. 448. O-1

2.—“*Except in the event of its being wound up.*”

N.B.—Including the time when a petition is pending. *Rudow v. Great Britain Mutual Society*, 17 Ch. Div. 600. P

PART IX.

MISCELLANEOUS PROVISIONS.

Company not to
buy its own shares. 249. No Company under this Act shall have power to buy its own shares¹.

(Notes).

* 1.—“*No Company.... shares.*”

(1) Purchase by company of its own shares.

- (i) The vexed question of the legality of the purchase by a Company of its own shares was set at rest in England by the decision of the House of Lords in *Trevor v. Whitworth*, 12 A.C. 409.

The grounds of the decision in *Trevor v. Whitworth*, 12 A.C. 409, and the principles which it affirms may be summarized thus: (i) Purchase by a Company of its own shares is not forfeiture or surrender or any thing like it. Forfeiture is valid, the Act recognizes it: the Company parts with no money, but resumes dominion of a share upon which something has been paid, and this because a further payment cannot be obtained. Surrender may in many cases be valid, *e.g.*, where the Company could forfeit and the member dispenses with the formalities. Each case of surrender must be determined upon its merits: at any rate the company parts with no consideration. (Unless the share is partly paid or unpaid, in which case the surrender is equivalent to a purchase: *Bellerby v. Rowland*, 1901, 2 Ch. 265), where money is paid or consideration given by the Company it is a purchase, and purchase is neither forfeiture nor surrender. Q

- (ii) The Company cannot be a member of itself. 17 Ch. D. 83. R

- (iii) The purchase of its own shares is a reduction of capital. The Act, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions and restrictions are observed. S

- (iv) The Act impliedly prohibits the return of capital to members. The payment of capital to one share-holder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the share-holders rateably. T

- (v) The transaction cannot be justified as “incidental” to the Company’s objects, *e.g.*, in a private Company where it is desired to keep the shares in the hands of a few. To the creditor whose interests the Act intends to protect it makes no difference what the object of the purchase is. U

The reduction of capital made when the Company purchases its own shares is

- (1) a reduction of paid-up capital, and (2) a reduction of issued capital, and (3), except where the shares are fully paid, a reduction of unpaid capital. For as to paid-up capital the company parts with money, and as to issued capital the shares cease to be in issue, since the company cannot be a member of itself, and as to unpaid capital there is no individual external to the Company who is now liable for calls on the shares. *Buckley on Companies*, 9th Ed., p. 71. Y

1.—No Company....shares—(Concluded).

(2) Purchase by bank of its own shares held *ultra vires*.

Held, that the purchase by the Bank of its own shares was *ultra vires* of the Bank, there being nothing in the memorandum of articles of association expressly authorizing such a transaction, and a purchase by a Company of their own shares not being a legal transaction, unless there is a clear and special authority authorising the Company to make such purchase. 38 P.R. 1881. W

(3) What is not purchase by Company of its own shares.

(a) The Company it is true is incompetent to buy its own shares, S. 249 of the Companies Act, 1882, but to restore this benefit which the Company obtained under the avoided agreement is a statutory liability and cannot be treated as buying back the shares. 100 P.R. 1905=10 P. R. 1905. X

(b) There is no element of bargaining in the refund, though the shares must be returned by the plaintiffs when the money is received by them. (*Ibid.*) Y

(c) S. 249 must refer to a conscious act of purchase by the Company, not a restoration of money under legal compulsion. (*Ibid.*) Z

(d) We do not think therefore that the plaintiffs here are precluded from obtaining the value of these shares or rupees 10,000 from the defendant Company. (*Ibid.*) A

(e) The rule as to the disability of Companies to buy their own shares, was laid down by the House of Lords in *Trevor v. Whitworth*, L. R. 12, Appeal Cases, (1887) 409. B

(g) But this has not affected the principle of restoration of benefits by Companies on the rescission of a contract, *e.g.*, on the ground of fraud or misrepresentation—See Lindley on Companies, 6th Ed., Vol. I, pp. 95—98. (*Ibid.*) C

(h) They contain many instances of cases of refunds of money paid as value of shares, particularly *Karbey's* case, (1892), 3 Chancery, 1; and *Ross v. Estate Investment Company*, L.R., 3 Eq., 122. (*Ibid.*) D

(i) The principle is the same where a contract is rescinded on the ground of fraud or misrepresentation or repudiated on the ground of want of authority in agent making it. (*Ibid.*) E

(j) Where the appointment of a *Mutsaddi*, by the Managing Agent of a Company, was never submitted to the meeting of the share-holders of a Company, the mere fact that the person appointed was allowed to work as *Mutsaddi*, for some time, could not be held to be either a ratification of, or acquiescence in, such appointment by the Company. (*Ibid.*) F

(k) Where, in pursuance of an agreement, under which a person was appointed as *Mutsaddi* of a Company, the person so appointed purchased shares in the Company, necessary for holding the appointment, and the agreement is repudiated by the Company, he is entitled to the return of the cash value of the shares, and such refund would not mean a purchase, by the Company, of its own shares, within the meaning of S. 249 of the Indian Companies Act, 1882. (*Ibid.*) G

X of 1866.

250. Where, previously to the commencement of this Act, an order has been made for winding-up a Company under the Indian Companies Act, 1866, or a resolution has been passed for winding-up a Company voluntarily, such Company shall be wound up in the same manner and with the same incidents as if this Act were not passed; and, for the purpose of such winding-up, the Indian Companies Act, 1866, shall be deemed to remain in full force.

(Notes).**(1) Corresponding English Law.**

This section corresponds to S. 287 of the English Companies (Consolidation) Act, 1908. **H**

(2) Legislative Changes.

Act X of 1866 was repealed by S. 2, *supra*. **I**

251. Where, previously to the commencement of this Act, any conveyance, mortgage-deed or other instrument has been made in pursuance of the Indian Companies Act, 1866, such instruments shall be of the same force as if this Act had not passed; and, for the purposes of such instrument, the Indian Companies Act, 1866, shall be deemed to remain in full force.

(Notes).**(1) Corresponding English Law.**

Cf. Para I of S. 288 of the English Companies (Consolidation) Act, 1908. **J**

(2) Legislative Changes.

Act X of 1866 was repealed by S. 2, *supra*. **K**

252. All offences under this Act may be tried by any Magistrate of the first class, unless the period of imprisonment to which the offender is liable exceeds that which such officer is competent to award under the law for the time being in force in the place in which he is employed. When the period of imprisonment provided by this Act exceeds the period that may be awarded by such officer, the offender shall be committed for trial before the Court of Session.

If any offence which by this Act is declared to be punishable by any penalty is committed by any person within the local limits of the ordinary original Civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

Punishment of offences committed within Presidency towns.

(Notes).

Corresponding English Law.

Cf. S. 276 of the English Companies (Consolidation) Act, 1908.

L

1.—“Cognizance of offences.”

Scope of section—“Offence”—“Penalty”—Power of Criminal Court to try case brought on complaint under S. 74, *supra*.

- (a) This section concerns the cognizance of “offences” under the Act and both S. 4 of the Criminal Procedure Code, and S. 3 of the General Clauses Act give practically the same definition of “Offence”—it is, any “act or omission made punishable by any law for the time being in force.” Per Williams, J., 8 Ind. Cas. 190=35 P.W.R. 1910 (Cr.). M
- (b) The latter portion of S. 252, though it refers to a “penalty” obviously only prescribes summary trial of offences by Presidency Magistrates. S Ind. Cas. 190 (192). N
- (c) “In both portions of this section the word “offence” is used; and I cannot agree that because “imprisonment” is referred to in the first portion, that means that only offences punishable with imprisonment are triable by Criminal Courts.” (*Ibid.*) O
- (d) “The first portion of that section means, in my opinion, that every description of offence under that Act can be tried by a first-class Magistrate, except those which must be tried by a Court of Sessions.” (*Ibid.*) P
- (e) “It has been argued that the word “penalty” is used in certain sections of the Companies Act; and “offence” in others; and that “offence” is only used in conjunction with “imprisonment.” (*Ibid.*) Q
- (f) “But in my opinion, the definition of “offence” in the Criminal Procedure Code and General Clauses Act applies to the Companies Act.” (*Ibid.*) R
- (g) “Nowhere in that Act nor in the Regulations made under it can I find any power given to the Registrar to deal executively as to inflicting a “penalty” with cases under S. 74; nor, in fact to levy any fine or penalty at all *suo motu*.” (*Ibid.*) S
- (h) A Criminal Court has power to try a case brought on a complaint under S. 74, *supra*. (*Ibid.*) T

253. Subject to the provisions hereinbefore

Power to make orders as to costs.

contained, the Court may, in any proceedings under this Act, make such order as to costs as it thinks fit.

(Notes).

Corresponding English Law.

Cf. S. 45 of the English Companies Act, 1867.

254. The High Court may from time to time make rules, con-

Power of High Court to make rules¹.

sistent with this Act and with the Code of Civil Procedure, concerning the mode of proceedings to be had for winding-up a Company in such

Court and in the Courts subordinate thereto, and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-division of the shares of a Company.

(Notes).

Corresponding English Law.

Cf. S. 238 of the English Companies (Consolidation) Act, 1908.

U

1.—“ Power of High Court to make rules.”

I.—Bombay.

Rules made by High Court, Bombay.

For—under the section, *See* Bombay Local Rules and Orders, Vol. I, 1896, Ed., pp. 270—320.

Y

II.—Calcutta.

Rules made by the High Court, Calcutta.

For—under this section, *See* Calcutta Gazette, 1903, Pt. I, p. 997 and Assam Gazette, 1903, Pt. II-A, p. 534.

W

III.—Punjab.

THE WINDING-UP OF A COMPANY UNDER THE INDIAN COMPANIES ACT, 1882.

Rules made by the Chief Court under the powers conferred by section 254 of the Indian Companies Act, 1882, concerning the mode of proceeding to be had for winding-up a Company.

Note.—The following rules were adopted with slight modifications from those made under section 189 of the old Act by the High Court of Judicature at Fort William in Bengal.

X

Rules.

I. Petitions for winding-up of Company.

Every petition for the winding-up of any Company by the Court or subject to the supervision of the Court, shall be intituled ‘ In the matter of the Indian Companies Act, 1882, and of “ the ” Company to which such petition shall relate, describing the Company by its most usual style or firm.

Y

II. Petition to be advertised.

Every such petition shall be advertised seven clear days before the hearing, once in the Punjab Gazette, and, when practicable, once at least in two local newspapers and also by proclamation affixed to the walls, of the Court house.

The advertisement shall state the day on which the petition was presented, the name and address of the petitioner and of his pleader or agent (if any).

Z

III. Petition how to be served.

Every such petition shall, unless presented by the Company, be served at the registered office (if any) of the Company, and, if there be no registered office, then at the principal or last known principal place of business of the Company, if any, such can be found, upon any member, officer or servant of the Company there, or in case no such member, officer or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members of the Company as the Court may direct. Every petition for the winding-up of a Company subject to the supervision of the Court, shall also be served upon the liquidator (if any) appointed for the purpose of winding-up the affairs of the Company.

A

*Rules—(Continued).***IV. Verification of petition for winding-up.**

Every petition for the winding-up of any Company by the Court or subject to the supervision of the Court, shall be verified in the prescribed form. Such verification shall be made by the petitioner or by one of the petitioners (if more than one); or if, by reason of absence or other good cause, any person by whom or on whose behalf such petition is presented is unable himself to verify the same, the Court may permit some other competent person to verify the petition. In case the petition is presented by any Company, the allegation thereof shall be verified by some director, Secretary or other principal officer thereof. Such verification shall be made and filed within four days after the petition is presented, and such verified statement shall be sufficient *prima facie* evidence of the statements in the petition. **B**

V. Contributory or creditor to be furnished on application with copy of petition.

Every contributory or creditor of the Company shall, on application to the Court in which the petition is presented, be entitled to be furnished with a copy of the petition on payment of the usual and customary fees for copies of documents in such Court, and such copy shall be furnished within twenty-four hours after the same shall have been applied for. **C**

VI. Order for winding-up to be advertised.

Every order for the winding-up of a Company by the Court or subject to its supervision, shall, within twelve days after the date thereof, be advertised by the petitioner once in the *Punjab Gazette* and otherwise as the Court may direct. **D**

VII. Application for order to proceed with winding-up.

Within ten days after the passing of any order for winding-up a company, the petitioner may apply for an order to proceed with the winding-up, and, in default of such application by the petitioner, any other person interested in the winding-up of the Company may apply to be permitted to have the carriage and prosecution of the order. Upon such application, the Judge shall issue a summons for proceeding with the winding-up of the Company, to be served upon all parties who may have appeared upon the hearing of the petition. Upon the return of such summons a time shall be fixed for the appointment of an official liquidator, for the proof of debts and for bringing in the list of contributories. Directions may be given as to the advertisements to be issued for all or any of such purposes, and generally as to the proceedings and the parties to attend thereon. The proceedings under the order shall be continued by adjournment, and, when necessary, by further summons, and any such direction as aforesaid may be given, added to or varied at any subsequent time, as may be found necessary. **E**

VIII. Official liquidator.

The Judge may appoint a person to the office of official liquidator without previous advertisement or notice to any party, or may fix a time or place for the appointment of an official liquidator, and may appoint or reject any person nominated at such time and place and appoint any person not so nominated. **F**

*Rules—(Continued).***IX. Time and place of appointment of official liquidator to be advertised.**

When a time and place are fixed for the appointment of an official liquidator, such time and place shall be advertised in such manner as the Judge shall direct, so that the first or only advertisement shall be published within fourteen days, and not less than seven days, before the day so fixed. **G**

X. Security of official liquidator.

Every official liquidator shall give security by entering into a recognizance with two or more sufficient sureties or by depositing Government securities to such amount as the Judge may approve. **H**

XI. Account of official liquidator.

The official liquidator shall be appointed by order; and, unless he shall have given security, a time shall be fixed by such order within which he is to do so and the order shall fix the times or periods at which the official liquidator is to bring into Court his accounts of his receipts and payments, and shall direct that all monies to be received shall be paid into the Bank of Bengal or into Court, immediately after the receipt thereof, to the account of the official liquidator of the Company, and an account shall be opened accordingly; and if the money is payable into the Bank of Bengal, an office copy of the order shall be lodged with the said Bank. **I**

XII. Security to be certified.

When an official liquidator has given security pursuant to the direction in the order appointing him, the same shall be certified by the Judge or Registrar. **J**

XIII. When fresh security to be given.

The official liquidator shall on each occasion of passing his accounts, and also whensoever the Judge may so require, satisfy the Judge that his sureties are living and resident in British India, and have not become insolvent or been adjudged bankrupt, and in default thereof he may be required to enter into fresh security or to deposit Government securities within such time and to such amount as shall be directed. **K**

XIV. Appointment of official liquidator to be advertised.

Every appointment of an official liquidator shall be advertised in such manner as the Judge shall direct immediately after he has been appointed and has given security. **L**

XV. Provisional official liquidator.

When it is desired to appoint provisionally an official liquidator an application for that purpose may, at any time after the presentation of the petition for winding-up the company, be made by petition without advertisement or notice to any person, unless the Judge shall otherwise direct. Such provisional official liquidator may, if the Judge shall think fit, be appointed without security. **M**

*Rules—(Continued).***XVI. Death or removal of official liquidator.**

In case of the death, removal or resignation of an official liquidator, another shall be appointed in his room in the same manner as directed in the case of a first appointment, and proceedings for that purpose may be taken by such party interested as may be authorised by the Judge to take the same. N

XVII. Duties of official liquidator.

The official liquidator shall, with all convenient speed, after he is appointed, proceed to make up, continue, complete and rectify the books of account of the Company, and shall provide and keep such books of account as shall be necessary or as the Judge may direct, for the purposes aforesaid, and for showing the debts and credits of the Company, including a ledger which shall contain the separate accounts of the contributories and in which every contributory shall be debited from time to time with the accounts payable by him in respect of any call to be made, as provided by the said Act and these rules. O

XVIII. Salary of official liquidator.

The official liquidator shall be allowed in his accounts, or otherwise paid, such amount by way of salary or remuneration as the Judge may from time to time direct, and the sum so fixed is to cover the expenses of the employment of assistants or clerks by the official liquidator, unless the Judge shall otherwise order. Such salary or remuneration may be fixed either at the time of appointment or at any time hereafter, as the Judge may think fit. Every allowance of such salary or remuneration, unless made at the time of the appointment or upon passing an account, shall be made upon application for that purpose by the official liquidator, on notice to such persons (if any) and supported by such evidence as the Judge shall require. Provided, nevertheless, that the Judge may, from time to time, allow any sum he may think fit to the official liquidator on account of the salary or remuneration to be thereafter fixed. P

XIX. Filing of accounts.

The accounts of the official liquidator shall be filed in Court at the times directed by the order appointing him, and at such other times as may from time to time be required by the Judge: and such accounts shall, upon notice to such parties (if any) as the Judge shall direct, be verified and passed in the same manner as Receiver's accounts. Q

XX. Advertisement for debts or claims.

For the purposes of ascertaining the debts and claims due from the Company, and of requiring the creditors to come in and prove their debts or claims, an advertisement shall be issued at such time as the Judge shall direct. Such advertisement shall fix a time for the creditors to send their names and addresses, and the particulars of their debts or claims, and the names and addresses of their pleaders (if any) to the official liquidator, and appoint a day for adjudicating thereon. R

*Rules—(Continued).***XXI. Debts not disputed need not be proved—Disputed debts to be proved.**

Creditors whose claims are not disputed need not attend upon the adjudication, nor prove their debts or claims.

Any creditor, or creditors receiving notice from the official liquidator that his or their debts or claims are disputed, must come in and prove the same within a time to be specified in the notice. S

XXII. Debts and claims to be investigated by official liquidator.

The official liquidator shall investigate the debts and claims sent in to him, and ascertain, so far as he is able, which of such debts or claims are justly due from the Company and he shall make out and file in Court a list of all the debts and claims sent in to him, distinguishing which of the debts and claims or parts of debts and claims, are, in his opinion, justly due and proper to be allowed without further evidence, and which of them, in his opinion, ought to be proved by the creditors; and he shall make and file, prior to the time appointed for adjudication, an affidavit, or written statement, verified by oath or affirmation, setting forth which of the debts and claims in his opinion are justly due and proper to be allowed without further evidence; and stating his belief that such debts and claims are justly due and proper to be allowed, and the reasons for such belief. T

XXIII. Adjudication of debts and claims.

At the time appointed for adjudicating upon the debts and claims, or at any adjournment thereof, the Judge may either allow the debts and claims upon the affidavit or verified statement of the official liquidator, or may require the same, or any of them, to be proved by the claimants, and adjourn the adjudication thereon to a time to be then fixed, and the official liquidator shall give notice of such allowance to the creditors whose debts or claims have been allowed. U

XXIV. Notice to be given to creditors whose claims have been disallowed.

The official liquidator shall give notice to the creditors, whose debts or claims have not been allowed upon his affidavit or statement, that they are required to come in and prove the same by a day to be named in the notice, being not less than four days after such notice, and to attend at a time to be therein named, being the time appointed by the advertisement, or by adjournment (as the case may be), for adjudicating upon such debts and claims. V

XXV. Contingent debts and claims, how estimated.

The value of all contingent debts and claims admissible to proof shall, as far as possible, be estimated according to the value thereof at the date of the order to wind up the Company. W

XXVI. Interest on claims allowed.

The interest on such debts and claims as shall be allowed shall be computed, as to such of them as carry interest, after the rate they respectively carry. X

XXVII. Costs of proving debts or claims.

Such creditors as come in and prove their debts or claims pursuant to notice from the official liquidator, shall be allowed their costs of proof, in the manner as in the case of debts proved in a suit. Y

*Rules—(Continued).***XXVIII. Result of adjudication to be certified by the Judge.**

The result of the adjudication upon debts and claims shall be stated in a certificate to be signed by the Judge, and certificates as to any of such debts and claims may be made from time to time. All such certificates shall state whether the debts or claims are allowed or disallowed, and whether allowed as against any particular assets, or in any other qualified or special manner. Z

XXIX. List of contributories.

The official liquidator shall, with all convenient speed after his appointment, or at such time as the Judge shall direct, make out and file in Court a list of the contributories of the Company and such list shall be verified by the oath or solemn affirmation of the official liquidator; and shall, so far as is practicable, state the respective addresses and the number of shares or extent of interest to be attributed to each such contributory, and distinguish the several classes of contributories. And such list may, from time to time, by leave of the Judge, be varied or added to by the official liquidator. A

XXX. Notice to contributories.

Upon the list of contributories being filed in Court, the official liquidator shall obtain an appointment for the Judge to settle the same, and shall give notice in writing of such appointment to every person included in such list, stating in what character, and for what number of shares or interest, such person is included in the list, and in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing shall be given to every person affected by such variation or addition. All such notices shall be served four clear days before the day appointed to settle such list or such variation or addition. B

XXXI. List of contributories to be certified by the Judge.

The result of the settlement of the list of contributories shall be stated in a certificate signed by the Judge; and certificates may be made from time to time for the purpose of stating the result of such settlement down to any particular time, or as to any particular person, or stating any variation of the list. C

XXXII. Sale of moveable or immoveable property belonging to the Company.

Any moveable or immoveable property belonging to the Company may be sold, with the approbation of the Judge, in such manner as the Judge shall direct, and the Judge may, on any sale by public auction, fix a reserve bidding, and unless on account of the small amount of the purchase-mones, or other cause, it shall (having regard to the amount of security given by the official liquidator), be thought proper that the purchase-mones shall be paid to him, all conditions and contract of sale shall provide that the purchase-mones shall be paid by the respective purchasers into the Bank of Bengal or into Court to the account of the official liquidator of the Company. D

XXXIII. Application to make call on contributories.

Every application to the Court to make any call on the contributories, or any of them for any purpose authorised by the said Act, shall be made by

Rules—(Continued).

petition stating the proposed amount of such call, and such petition shall be served four clear days at the least before the day appointed for making the call on every contributory affected by such call, or if the Judge shall so direct, in lieu of service of notice, on the individual contributories or any of them. Notice of such intended call may be given by advertisement or such other public notification as the Judge in his discretion may think sufficient. E

XXXIV. Copy of order for a call to be served on each contributory.

When any order for a call has been made, a copy of such order shall be forthwith served upon each of the contributories included in such call, together with a notice from the official liquidator specifying the amount due from such contributory in respect of such call; but such order need not be advertised unless for any special reason the Judge shall so direct. F

XXXV. Adjournment of proceedings.

At the time of making an order for a call, the further proceedings relating thereto shall be adjourned to a time subsequent to the day appointed for the payment thereof, and afterwards from time to time so long as may be necessary; and at the time appointed by any such adjournment, or upon a summons to enforce payment of the call duly served, and upon proof of the service of the order and notice of the amount due and non-payment, an order may be made for all or any of the contributories who have made default to pay the sum which by such former order and notice they were respectively required to pay, or any less sum which may appear to be due from them respectively. G

XXXVI. Delay in the payment of monies by the official liquidator.

If any official liquidator shall not pay all the monies received by him into the Bank of Bengal or the Court to the account of the official liquidator of the company within seven days next after the receipt thereof, unless the Judge shall have otherwise directed, such official liquidator shall be charged in his account with five rupees in every thousand rupees, and a proportionate sum for any larger amount retained in his hands beyond such period, for every seven days during which the same shall have been so retained, and the Judge may for any such retention disallow the salary or remuneration of such official liquidator. H

XXXVII. Bills, hundis, &c., to be deposited in the bank of Bengal or in Court.

All bills, hundis, notes, and other securities payable to the Company or to the official liquidator thereof shall, as soon as they shall come to the hands of such official liquidator, be deposited by him in the Bank of Bengal or in Court, for the purpose of being presented for acceptance and payment, or for payment only, as the case may be, or shall be dealt with as the Court shall otherwise order. I

XXXVIII. Payments of calls, &c., how to be made.

All orders for payment of calls, balances, or other monies due from any contributory or other person shall direct the same to be paid into the Bank of Bengal or into Court to the account of the official liquidator of the Company, unless on account of the smallness of the amount or other

Rules—(Continued).

cause, it shall (having regard to the amount of the security given by the official liquidator) be thought proper to direct payment thereof to the official liquidator: Provided that where any such order has been made directing payment of a specific sum into the Bank of Bengal or into Court, in case it shall be proper for the purpose of enabling the official liquidator to issue execution or take other proceedings to enforce the payment thereof, or for any other reason, an order may, either before service of such former order or after the time thereby fixed by payment, be made without notice for payment of the same sum to the official liquidator. J

XXXIX. Payments how to be credited.

All monies, bills, hundis, notes and other securities paid and delivered into the Bank of Bengal or into Court, shall be placed to the credit of the account of the official liquidator of the Company, and orders for any such payment and delivery shall direct the same accordingly. K

XL. On what authority monies, &c., to be delivered by Bank.

All bills, hundis, notes and other securities delivered into the Bank of Bengal or into Court, shall be delivered out upon a request signed by the official liquidator and countersigned by the Judge, or the Registrar, under the orders of the Court, and monies placed to the account of the official liquidator shall be paid out upon cheques or orders, signed by the official liquidator and countersigned by the Judge, or the Registrar or under the orders of the Court. L

XLI. Investment of monies.

All or any part of the money for the time being standing to the credit of the account of the official liquidator at the Bank of Bengal, or in Court, and not immediately required for the purpose of the winding-up may be invested in the purchase of Government promissory notes, bearing interest, in the name of the official liquidator. All such investments shall be made upon a request signed by the official liquidator and countersigned by the Judge, which request shall be sufficient authority for debiting the account with the purchase-money. Such Government promissory notes shall not afterwards be sold or transferred or otherwise dealt with except upon a direction for that purpose signed by the official liquidator and countersigned by or under an order to be made by the Judge. M

XLII. Interest upon investments.

All interest accruing due upon any such Government promissory notes shall from time to time be received by the Bank of Bengal, or the Court, and placed to the credit of the account of such official liquidator. N

XLIII. Notice to be given of meeting of creditors or contributories.

When the Judge shall direct a meeting of the creditors or contributories of the Company to be summoned under Ss. 140 or 193 of the said Act, the official liquidator shall give notice in writing, seven clear days before the day appointed for such meeting, to every creditor or contributory, of the time and place appointed for such meeting, and of the matter upon which the Judge desires to ascertain the wishes of

Rules—(Continued).

the creditors or contributories; or, if the Judge shall so direct, such notice may be given by advertisement, in which case the object of the meeting need not be stated. O

XLIV. Votes may be given personally or by proxy.

The votes of the creditors or contributories of the Company at any meeting summoned by the direction of the Judge may be given either personally or by proxy. P

XLV. Appointment of chairman at meetings.

The direction of the Judge for any meeting of creditors or contributories under S. 140 or 193 of the said Act and the appointment of a person to act as chairman of any such meeting, shall be testified by a memorandum signed by the Judge, or by the Registrar under the direction of the Judge. Q

XLVI. Drawing, accepting, &c., of bills.

The sanction of the Judge to the drawing, accepting, making or endorsing of any bill of exchange, hundi or promissory note, by any official liquidator shall be testified by a memorandum on such bill of exchange, hundi or promissory note signed by the Judge, or by the Registrar under the direction of the Judge. R

XLVII. Compromise.

Every application for the sanction of the Judge to a compromise with any contributory or other person indebted to the Company, shall be supported by the affidavit or affirmation of the official liquidator, that he has investigated the affairs of such contributory or person, and stating his belief that the proposed compromise will be beneficial to the company, and his reason for such belief and the sanction of the Judge thereto shall be testified by a memorandum signed by the Judge, on the arrangement of compromise, unless any party shall desire to appeal from the decision of the Judge, in which case an order shall be drawn up for the purpose. S

XLVIII. Sanction of Judge to proceedings, how obtained.

The direction or sanction of the Judge for any other proceeding or act to be taken or done by the official liquidator shall be obtained upon petition. T

XLIX. Applications to be by petition.

Every application under Ss. 181, 182 or 216 of the said Act shall be made by petition. U

L. Advertisements how to be published.

When an advertisement is required for any purpose, the advertisement, except when otherwise directed by these rules, shall be published as the Judge shall direct, or it may take the form of a public notification or proclamation. V

LI. Cost of proving documents.

Any party to any proceeding relating to the winding-up of a Company may, by notice in writing, call on any other party thereto competent to admit the same, to admit any document, saving all just exceptions,

Rules—(Continued).

and in case of refusal or neglect so to admit, the costs of proving such document shall be paid by the party so refusing or neglecting, unless the Judge shall be of opinion that the refusal to admit was reasonable. No cost of proving any document shall be allowed unless such notice shall have been given, except in cases where the omission to give such notice has been, in the opinion of the Judge, a saving of expense. **W**

LII. Affidavits intended to be used to be filed in Court.

When an order shall have been made for the winding-up of any Company any person intending to use any affidavit in any proceeding under any such order shall file the same in Court and give notice thereof to the official liquidator. **X**

LIII. Register of proceedings.

A register shall be kept by the Court of all proceedings before the Court in each matter with proper dates, so that all the proceedings may appear consecutively and in chronological order, with a short statement of the question or points decided or ruled at every hearing. **Y**

LIV. Inspection of accounts by contributories and creditors.

Every contributory of the Company, and every creditor thereof whose debt or claim has been allowed, shall be entitled, at all reasonable times, to inspect all books of accounts, papers or documents relating to the winding-up of the Company, in the custody of the official liquidator, free of charge, and at his own expense to take copies or extracts from the same, or to be furnished with such copies or extracts at a rate not exceeding four annas per folio of ninety words. **Z**

LV. Rules applicable to provisional liquidators.

All the above rules relating to official liquidators shall, so far as the same are applicable, and subject to the directions of the Judge in each case, apply to provisional liquidators. **A**

LVI. Cost of attendance of contributories or creditors at proceedings.

Every person for the time being on the list of contributories of the Company as filed in Court by the official liquidator, and every person whose debt or claim against the Company shall have been allowed by the Judge, shall be at liberty, at his own expense, to attend the proceedings before the Judge, and shall be entitled, upon payment of the costs occasioned thereby, to have notice of all such proceedings as he shall by written request desire to have notice of; but if the Judge shall be of opinion that the attendance of any such person upon any proceeding has occasioned any additional costs which ought not to have been borne by the funds of the Company, he may direct such costs, or a gross sum in lieu thereof, to be paid by such person; and such person shall not be entitled to attend any further proceedings until he has paid the same. **B**

LVII. Appointment of one or more contributories or creditors as representatives of other contributories or creditors.

The Judge may, from time to time, appoint any one or more of the contributories, or creditors as he thinks fit, to represent before him, at the expense of the Company, all or any class of the contributories or

Rules—(Continued).

creditors upon any question as to a compromise with any of the contributories or creditors, or in and about any other proceedings before him relating to the winding-up of the Company, and may remove the person or persons so appointed. In case more than one person shall be so appointed, they shall employ the same attorney, pleader, or agent to represent them. C

LVIII. Only contributories or creditors whose names are entered are entitled to attend proceedings.

No contributory or creditor shall be entitled to attend any proceedings before the Judge, unless and until he has entered in a book to be kept there for that purpose his name and address and the name and address of his attorney, pleader or agent (if any), and upon any change of his address or of his attorney, pleader or agent, his new address, and the name and address of his new attorney, pleader or agent. D

LIX. Service upon contributories and creditors, how effected.

Service upon contributories and creditors shall be effected (except when personal service is required) by sending the notice, or copy of the petition, summons, order, or other proceeding, through the post in a registered letter addressed to the party or his attorney, pleader or agent at the address entered, or last entered, pursuant to the preceding rule, or if no such entry has been made, then if a contributory, to his last known address or place of abode, and if a creditor, to the address given by him pursuant to rule XX, and such notice, or copy, summons, order, or other proceeding shall be considered as served at the time the same would be delivered in the due course of post. E

LX. Official liquidator to present balance sheet upon termination of proceedings.

Upon the termination of the proceedings for the winding-up of any Company, a balance sheet shall be brought in, by the official liquidator, of his receipts and payments, duly verified by his oath or affirmation. The official liquidator shall pass his final account, and the balance (if any) due thereof shall be certified by the Judge, and upon payment of such balance, in such manner as the Court shall direct, the recognizance entered into by the official liquidator and his sureties may be vacated. F

LXI. Judge when to certify that Company has been completely wound up.

When the official liquidator has passed his final account, and the balance (if any) certified to be due thereof has been paid in such manner as the Court shall direct, a certificate shall be made by the Judge that the affairs of the Company have been completely wound up, and in case the Company has not been already dissolved, the official liquidator shall, immediately after the issue of such certificate, apply to the Judge for an order that the Company be dissolved from the date of such order. G

LXII. When winding-up complete, books &c., to be deposited in Court.

When the proceedings for winding-up any Company have been completed, all books, papers and documents belonging or appertaining to the Company and the book containing the official liquidator's account, shall be deposited in Court. H

Rules - (Concluded).

LXIII. Forms.

The form * prescribed for use under these rules shall be used with such variation as the circumstances of each case may require. I

LXIV. Taxation of costs.

Where an order is made in the Chief Court for payment of any costs, the order shall direct the taxation thereof by the Registrar, except in cases where a gross sum in lieu of taxed costs is fixed by the order. J

LXV. Procedure.

The general practice of the Court shall, in cases not provided for by the Indian Companies Act, or these rules, and so far as the same are applicable and not inconsistent with the said Act or these rules, apply to all proceedings for winding-up a Company in any Court. K

LXVI. Rules to take effect from what date.

These rules shall take effect and come into operation on and after the 1st of June, 1870. L

255. In sections 1 and 18 of Act No. XXI of 1860 (*for the registration of Literary, Scientific and Charitable Societies*), the words "Registrar of Joint-Stock Companies" shall be construed to mean Registrar of Joint-Stock Companies under this Act or any Act for the time being in force.

Construction of
"Registrar of Joint-
Stock Companies"
in Act XXI of 1860.

256. Save as provided in sections 152 and 153, nothing in this Act shall be deemed to apply to the Bank of Bengal, the Bank of Madras and the Bank of Bombay.

FIRST SCHEDULE.

TABLE A.

**REGULATIONS FOR MANAGEMENT OF A COMPANY
LIMITED BY SHARES.**

Shares.

(1) If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

(2) Every member shall, on payment of eight annas or such less sum as the Company in general meeting may prescribe, be entitled to a certificate under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.

* See Book of Forms.

(Notes).

(1) Corresponding English Law.

Every person whose name is entered as a member in the Register of Members shall, without payment, be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all. [Art. 6, Table A, Sch. I, English Companies (Consolidation Act), 1908.] M

(2) Certificate to be issued within reasonable time.

A share-holder is entitled to have his certificate issued to him "within a reasonable time." [*Burdett v. Standard Exploration Co.* (1900), 16 Times L.R. 112.] N

(3) If such certificate is worn out or lost, it may be renewed on payment of eight annas or such less sum as the Company in general meeting may prescribe.

(Notes).

(1) Corresponding English Law.

If a share certificate is defaced, lost, or destroyed it may be renewed on payment of such fee, if any, not exceeding one shilling, and on such terms, if any, as to evidence and indemnity as the directors think fit. [Art. 7, Table A, Sch. I, English Companies (Consolidation) Act, 1908.] O

(2) Power conferred to be exercised with caution.

Under S. 54, *supra* the certificate is *prima facie* evidence of the title of the member to the shares therein specified and is frequently deposited as security for a loan. The power in this clause should therefore be exercised with great caution. [*Gore-Browne & Jordan on Joint-Stock Companies*, 30th Edition, p. 513.] P

Calls on shares.

(4) The directors may from time to time make such calls ¹ upon the members ² in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice ³ at least is given of each call; and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors.

(Notes).

Corresponding English Law.

"The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall

(subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares." [See Art. 12, Table A., Sch. I, The English Companies (Consolidation) Act, 1908.] Q

1.—"The Directors....calls."

(1) Power to make calls fiduciary.

- (a) A director is a trustee for the general body of share-holders of his power of making calls, and must not use it for his own benefit, without regard to their interests. *Gilbert's case*, 5 Ch. 559. R
- (b) Nor could he use it so as to throw (without proper disclosure) a burden on the other share-holders which he and his colleagues do not share. *Alexander v. Automatic Telephone Co.* (1900), 2 Ch. 56. S
- (c) But he is in no sense a trustee for the creditors notwithstanding what was said in *Gastlight Improvement Co. v. Terrell*, 10 Eq. 168 (175); by Romilly, M.R.
- (d) And if on the eve of liquidation he, being under a double liability, pay up his shares in such manner as, in fact to diminish the creditors' fund, they cannot complain. See *Poole's case*, 9 Ch. Div. 322. T
- (e) He is, moreover, only a trustee for the share-holders, in a qualified sense. *Forest of Dean Coal Co.*, 10 Ch. D. 450. U

(2) Authority to make calls.

The liquidator in a voluntary winding-up may enforce payment of a call previously made by the directors. *Stone v. City and County Bank*, 3 C.P. Div. 282, 299, 309. Y

(3) Second call for same sum.

A call once made but which has not resulted in payment does not exhaust the power to call, *e.g.*, if a share has been forfeited for non-payment of a call, another call for the same sum may be made upon the subsequent purchaser of the forfeited share. *New Balkis v. Randt Gold*, (1903), 1 K.B. 461; (1904) A.C. 165. W

(4) Call by directors—Quorum.

- (a) In *Thames Haven Dock Co. v. Rose*, 4 Man. & Gr. 552, the statute governing the company provided that its concerns should "be carried on under the management of twelve directors to be chosen, &c.," and named nine persons as the first directors; it further provided that the directors for the time being should meet, and that they should not be competent to determine on any business unless at least five directors should be present. As matter of construction the Court came to the conclusion that the provision as to twelve directors was directory only, and held that when the number of directors had dropped to seven, a call made by five of the seven was good. See as to this case, *New Sombbrero Co. v. Erlanger*, 5 Ch. D. 73 (100.) X
- (b) A call made at a meeting at which the necessary quorum of directors was not present, and confirmed when a quorum was present, was good. *Phosphate of Lime Co., Austin's case*, 24 L.T. 932. Y

(5) Interference of Court.

- (a) The Court will not in general take upon itself to investigate the propriety or necessity of a call. This is such an interference in the internal management of a going concern as the Court will decline to undertake. *Bailey v. Birkenhead Railway Co.*, 12 Beav. 433. Z

1.—“The Directors....calls ”—(Continued).

- (b) But if it be shown that the call is illegal, as made for a purpose not within the objects of the company, it is conceived that the Court would interfere at the instance of a minority of share-holders, or even of a single share-holder, if it be shown that the majority are in favour of the call, on the principle of those cases which have determined that one of several share-holders or partners is entitled to protection against the illegal acts of a majority. *Natusch v. Irving*, 2 Coop, C.C. 358. A
- (c) In *Preston v. Grand Collier Dock Co.*, 11 Sim. 327, a demurrer to a bill filed by a share-holder to compel certain other share-holders to pay calls which the directors refused to enforce against them on the ground that they held the shares only in trust for the company, was overruled.

(6) Irregularities—Effect.

- (a) If a call be made by the proper authority for a proper purpose, it is not every trifling irregularity that will vitiate the call. *Buckley on Companies*, 9th Ed., 571. B
- (b) Thus where the deed of settlement required that the call should be advertised, *quære*, whether the omission of this formality was open as a ground of objection to the call by a share-holder who was present at the meeting at which the call was made, the share-holders having in effect and substance had notice by circular. *British Sugar Refining Co.*, 3 K. & J. 408. C

(7) Prospective call.

A call is not invalid because made prospectively, as *e.g.*, by a resolution passed on the 13th of March that a call be made on the 30th of March, payable on the 1st of May. *Sheffield Railway Co. v. Woodcock*, 7 M. & W. 574. D

(8) Intention not to make calls.

- (a) The prospectus of a Company will sometimes state that it is not intended to make calls beyond a certain amount, but such a statement cannot deprive the Company of its power to make calls, or relieve the share-holder of his obligation to pay them. A statement that “no further calls are contemplated,” affords no defence by way of equitable plea to an action for calls. *Accidental Insurance Corporation v. Davis*, 15 L.T. 182. E
- (b) An agreement that a person shall not, as a share-holder, be liable to pay calls, but shall only be a share-holder for the purpose of participating in profits, is *ultra vires* and void. *Bunn's case*, 2 D.F. & J. 275, 295, 299. F

(9) Agreement that calls shall not be payable in cash.

- (a) It has come under consideration whether an agreement that calls shall not be payable in cash, but only by set-off against goods supplied, can be supported. It is conceived that for the reasons assigned in *Pellatt's case*, 2 Ch. 527, 533, 535, such an agreement is *ultra vires*, so far at least as it may be sought to extend it to relieve the share-holder from payment in cash of a call in respect of which he cannot, at the time the call is payable, shew payment by set-off of a sum at that time due to him from the Company for goods supplied before that date. See, however, *Black & Co.'s case*, 8 Ch. 254 (265). G

I.—“The Directors....calls” —(Continued).

- (b) For the liability of a share-holder to pay calls is a liability defined by the Act, which makes this liability a specialty debt, and gives the Company the usual remedies of a specialty creditor. To hold that the directors have power to relieve a share-holder from payment of calls in the manner referred to would be to allow them to deprive the Company of these advantages, and to place it in a position in which its only remedy against the share-holder would be by action for breach of contract. *Buckley on Companies*, 9th Ed., p. 572. H
- (c) It is at any rate perfectly clear that as respects calls made in the winding-up, such an agreement is inoperative to relieve the share-holder from the obligation of payment. A Company cannot contract with one of its share-holders that that law as laid down in *Grissell's case*, 1 Ch. 538, where that law is applicable, shall not apply to him. *Black & Co.'s case*, 8 Ch. 254. I

(10) Payment of call whether made.

- (a) Where a director of a Company affected to have paid a portion of a call by a debenture of the Company not yet payable, which the directors redeemed at a discount, it was held that this could not be treated as a payment of the call, for it was a set-off of money not actually due. *Habershone's case*, 5 Eq. 286. J
- (b) Where the directors, having power to receive payment of calls in advance, paid into the bank the amount remaining uncalled on their shares, and on the same day appropriated the money in payment of their fees, it was held that there had been no *bona fide* payment of calls in advance, and that the directors remained liable on their shares. *Syke's case*, 13 Eq. 255. K
- (c) In *Rance's case*, 6 Ch. 104, where a bonus had been improperly declared and credited to a director against arrears of calls due from him, it was said at p. 115 that the transaction might perhaps have been properly declared wholly void and the contributory as in the case last cited, left liable to the unpaid calls. But owing to the form of the application, the same result was arrived at by directing re-payment under S. 215, The English Companies (Consolidation Act, 1908, Act VI of 1882). L
- (d) But, even where a company is in difficulties, there may be payments properly made to a director which, even having regard to his fiduciary position, he is not disabled from receiving, and if any such are applied in payment by way of set-off of moneys payable on shares, this will be an effectual payment. *Buckley on Companies*, 9th Ed., p. 573. M
- (e) Thus where a company (whose articles allowed directors to participate in the profits of contracts with the company), wishing to rid themselves of an onerous contract with the director, agreed with him to cancel the contract and pay him compensation and in compliance with a condition in the agreement he applied the compensation in paying up his shares in full, this was held a good payment, although the company was wound up on a petition presented less than two months afterwards. *Adamson's case*, 13 Eq. 670. N

1.—“The Directors....calls ”—(Concluded).

(11) Allotment moneys.

The payment required on an allotment of shares is not a call. *Croskey v. Bank of Wales*, 4 Giff. 314. **O**

2.—“Members.”

Who is liable to pay calls.

- (a) This article, by proving that calls are to be made upon the members, obviates any such question as has arisen under other Acts as to whether mere subscribers or scrip-holders are liable to calls. *Buckley on Companies*, 9th Ed., p. 573. **P**
- (b) Where a company brought an action to enforce a call against a transferee of shares, upon bill filed charging that the transfer was fraudulent and void, and that the transferee was not a member, an injunction was granted to stay the action. *Blowam v. Metropolitan Cab. Co.*, 4 N.R. 51. **Q**
- (c) If a transfer of shares has been made and registered after a call has been made, but before it has become payable, it is conceived, although it is by no means clear, that the transferor and not the transferee is the person liable in an action for the call. See the dicta of *Lindley, L.J.*, *National Bank of Wales*, *Taylor's case* (1897), 1 Ch. 306. **R**
- (d) A call is owing from the day on which it is made, although it be “payable” on a subsequent day. *China Steamship Co., Dawes Case*, 58 L. J. (Ch.) 512, decided on a question of liability to a call by a member whose shares were forfeited before the call was payable.
- (e) In a company whose articles provided that no transfer should be made until all arrears of calls had been paid, it was held that a transferee by way of mortgage, who had been recognized by the company as a share-holder, could not be compelled to pay calls which were due at the time of the transfer, and that the shares could not in his hands be forfeited for their non-payment. *Watson v. Bates*, 23 Beav. 294. **S**

3.—“Notice.”

Notice.

- (a) If, in an action for a call, it be shown that the person sued has had notice of that call, the fact that other share-holders have not received notice, or that the form of notice sent out would not as to some of the share-holders have been a valid notice affords no defence. *Newry and Enniskillen Railway Co. v. Edmunds*, 2 Ex. 118; *Shackford Ford & Co. v. Dangerfield*, L.R. 3 C. P. 407. **T**
- (b) Where the articles required that, upon non-payment of a call, the notice of call should be repeated within a certain time, a mere notice that the company would come under liabilities, and would be in want of money at that time, was not sufficient. *Chuba Tea Co. v. Barry*, 15 L.T. 449. **U**

(5) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call ¹ was passed.

3.—“Notice”—(Concluded).

(Notes).

Corresponding English Law—Changes.

Table A, of the English Act of 1862 contained in Art. (5) a provision that “a call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.” This is not re-produced in the new Act of 1908. Its purpose was to quiet the doubt which was at one time felt, whether a call is to be taken as made at the date of the resolution, or at the date of the notice of call. The point may sometimes be of importance when a certain interval is to elapse between two calls, or possibly where questions of liability arise as between transferor and transferee or in questions respecting forfeited shares. *Dawes' case*, 38 L.J., Ch. 512. Y

1.—“A call....such call.”

(1) Prospective call.

If a call be made by a prospective resolution, *e.g.*, if a resolution be passed on the 13th of March that a call be made on the 30th of March payable on the 1st of May, *quære*, whether the resolution must be treated as of the 30th of March. *Sheffield Railway Co. v. Woodcock*, 7 M. & W. 574. W

(2) Absence of definite provision as to date of call—Practice.

In the absence of a definite provision as to the date at which a call is to be considered as made, the practice of the company will be regarded in ascertaining the date. *Addams v. Ferick*, 26 Beav. 384 (393). X

(3) Resolution for a call—Requisites.

A resolution for a call must state not only the amount of the call, but also the time at which it is to be paid. If the date for payment be left in blank there is no valid call. *Cawley & Co.*, 42 Ch. Div. 209. Y

(6) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest ¹ for the same at the rate of 5 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

(Notes).

Corresponding English Law.

If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of 5 pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part. [Art. 14, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] Z

1.—“If the Call....interest.”

(1) Interest on calls to apply to what calls.

Quære, provisions in the articles as to interest on calls apply only to directors' calls and not to calls made by the liquidators. *Welsh Flannel Co.*, 20 Eq. 360. A

1.—“If the Call....interest”—(Concluded).

(2) Provision for payment of interest. Forfeiture clause—Effect.

Where the articles, after providing for payment of interest, contained a forfeiture clause, providing that forfeiture should extinguish all rights incident to the share, but that the share-holder should remain liable to pay calls owing at the time of forfeiture, it was held that interest could not be recovered under the articles upon the arrears of calls due on shares forfeited for non-payment. *Stocken's case*, 5 Eq. 6. **B**

(3) Forfeiture consequent on notice claiming interest from date of call.

A forfeiture made consequent upon a notice which claims interest from the date of the call instead of from the day fixed for its payment, is invalid. *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687. **C**

(4) Time to be fixed by formal resolution.

The time fixed for payment of a call should be fixed by a formal resolution of the directors, not by a mere verbal direction to the Secretary. *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687. **D**

(7) The directors may, if they think fit, receive, from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and, upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest ¹ at such rate as the member paying such sum in advance and the directors agree upon.

(Notes).

Corresponding English Law.

The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid by shares held by him; and upon all or any of the monies so advanced may (until the same would but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, 6 per cent. as may be agreed upon between the member paying the sum in advance and the directors. [Art 17, Table A, Schedule I, The English Companies (Consolidation) Act, 1908.] **E**

1.—“The directors....interest.”

(1) Interest not dividend.

The word “interest” in this article does not mean dividend. The interest upon moneys paid in advance is a legal debt payable out of any assets of the company, including capital. *Dale v. Martin*, 9 L.R. Ir. 498. **F**

(2) Interest out of capital.

There is nothing *ultra vires* in paying, and nothing illegal in an article expressly providing for paying, such interest out of capital. *Lock v. Queensland Investment, Co.* (1896), 1 Ch. 397. **G**

1.—“The directors....interest”—(Concluded).

(3) Agreement to pay interest to be *bona fide*.

But the agreement to pay such interest must be made in good faith and in the honest exercise of the directors' discretion. If, under cloak of a power to receive money in advance of calls, but a small amount is called upon shares, and a large amount is received in advance of calls with a view to payment in substance of dividend irrespective of profits, a very serious liability might be incurred. (*Ibid.*) H

(4) Power to receive payment of calls fiduciary.

A power to receive payment of calls in advance is, like the power to make calls, a fiduciary power, which the directors are bound to exercise *bona fide* for the benefit of the company and if they exercise it for their own interests only, the transaction is liable to be set aside as a fraud upon the power. *Gilbert's case*, 5 Ch. 559; *Sykes' case*, 13 Eq. 255. I

(5) Directors not in any way trustees.

But the directors are not in any way trustees for the creditors, and the creditors cannot complain if this power has been exercised in such manner as, in fact, to diminish the fund available for payment of the company's debts. *Poole's case*, 9 Ch. Div. 322. J

(6) Winding-up—payment of debts—Surplus assets for division among shareholders.

In the winding-up of the company if after payment of debts there are surplus assets for division amongst the share-holders, the amount paid in advance with interest to payment (and not merely to commencement of winding-up) will be re-payable before the balance is divided equally among all. *Exchange Drapery Co.*, 38 Ch. D. 171. K

(7) Interest even if there are no profits.

Interest on the sum so paid in advance can be paid by the Company even if there are no profits. *Lock v. Queensland Investment Co.*, (1896) App. Ca. 461. L

Transfers of Shares.

(8) The instrument of transfer of any share in the Company shall be executed both by the transferor and transferee¹, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register-book in respect thereof.

(Notes).

Corresponding English Law.

This article is exactly similar to Art. 18, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. M

1.—“The instrument of transfer....transferee.”

(1) Scope of the article—Transfer by deed.

The article provides that the transfers shall be “executed” both by transferor and transferee, but it is conceived that according to the English law this need not be by deed sealed and delivered. See E. P. Sargent, 17 Eq. 273. N

1.—“The instrument of transfer...transferee”—(Continued).

(2) Transfers in blank.

(a) Where, transfers are required to be made by deed, a transfer in blank, *i.e.*, a transfer signed by the transferor leaving a blank for the name of the transferee, is void at law, and is, in fact, as a deed wholly inoperative. *Hibblewhite v. McMorine*, 6 M. & W. 200. O

(b) And in equity such an instrument cannot be of any greater validity as a deed, although as an agreement constituting in equity a transfer of the ownership, it will give a right (subject to any superior equity) to call for a legal transfer. *Powell v. London and Provincial Bank*, (1893) 1 Ch. 610; 2 Ch. 555; *Morris v. Cannan*, 4 D. F. & J. 581. P

(c) But under S. 45 of this Act, agreement to become a member is the essential requisite for being a member, and, therefore, where this agreement is shewn, the invalidity of the transfer as a deed is of no importance. For the question is not the validity of the instrument as a deed, but whether the transferor has agreed to transfer and the transferee to accept the shares purporting to be transferred. *Langer's case*, 37 L. J. Ch. 292. Q

(3) Transfer by instrument in writing without seal sufficient under articles—Addition of seal—Effect.

Where under the Company's articles a transfer by instrument in writing, without seal, is sufficient, the addition of a seal does not render the instrument any the less effectual. See *Ortigosa v. Brown Janson & Co.*, 38 L.T. 145, where Hall, V.C., said he had ascertained that the instrument in *E. P. Sargent*, 17 Eq. 273 was under seal. R

(4) Articles requiring execution of transfer by transferor and transferee—Transfer by transferor alone—Effect.

(a) But if the articles require the transfer to be executed by both transferor and transferee, *semble*, a transfer executed by transferor alone does not pass the legal title. See *Ortigosa v. Brown Janson & Co.*, 38 L.T. 145. S

(b) The transfer in this case bore an indorsement stating that the transferee's title would not be complete nor would the transfer be binding on the company until the transferee was registered and that in order to procure registration the transferee must sign an acceptance of the shares; but apart from this, Hall, V.C., held that the legal title did not pass. *Buckley on Companies*, 9th Ed., p. 578. T

(c) There is, however, no principle of law that a transferee cannot become a share-holder unless he had signed the transfer, and if he has been registered as a share-holder and has acted as a share-holder he may be liable. *Cunninghame v. Glasgow Bank*, 4 A.C. 607. U

(5) Execution by transferee required for what?

Execution by the transferee is required to evidence his agreement to become a member of the company. (See *Gosse-Brown and Jordon on Joint Stock Companies*, 30th Ed., p. 516.) Y

(6) Transfer in blank by way of security.

(a) The common way of giving security upon shares is by depositing with the mortgagee a transfer executed by the mortgagor, and the certificates of the shares. The transfer is commonly in blank as regards the

1.—“The instrument of transfer....transferee”—(Continued).

name of the transferee and the date of execution. A good equitable security may thus be given upon the shares whether the constitution of the company do or do not require transfers to be by deed, and notice to the company is not necessary for the purpose of perfecting the mortgagee's title and so preserving priority against subsequent equitable titles. *Societe General v. Walker*, 11 A.C. 20; *Francis v. Clark*, 22 Ch. D. 890. W

- (b) Where the first equitable mortgagee holds the certificates containing (as is often the case) a note that no transfer will be registered until the certificate is delivered, the notice of a subsequent transferee who has not got the certificates is *a fortiori* inoperative to give him priority over the earlier transferee who has. (*Ibid.*) W-1

As to certification of transfer, *i.e.*, certificate given by the company to a purchaser that his vendor's certificates have been lodged. See *Bishop v. Balkis Co.*, 25 Q.B.D. 77. X

- (c) The holder of a blank transfer as security may be, and probably is, entitled to fill in his own name and register the transfer holding then of course the legal title to the shares as security. In which case he may have an implied power of sale on failure of the mortgagor to pay after the lapse of a reasonable time. *Deverges v. Sandeman*, (1901) 1 Ch. 70. Y

- (d) He is entitled, no doubt, to transfer his security and to fill in the name of the purchaser of the security and register the shares in such purchaser's name, the purchaser holding similarly the legal title as security. But he is not entitled to mortgage the shares themselves, and authorize their registration in the name of the new mortgagee as security for his own debt to the new mortgagee. *France v. Clark*, 22 Ch. D. 890. Z

- (e) Upon the question how far a transferor who executes a transfer in blank and places it in the hands of an agent who deals with it in fraud of the transferor is estopped from disputing the title of an honest purchaser. See the *Colonial Bank v. Cady*, 15 A.C. 267; *Bentwick v. London Joint Stock Bank*, (1893) 2 Ch. 120, 144. A

(7) Unimportant irregularities in instruments of transfer.

Irregularities of various kinds in the instrument of transfer may be wholly unimportant. Buckley on Companies, 9th Ed., p. 579. B

EXAMPLES.

- (a) If the articles require transfers to be “in the usual common form,” the omission of particulars which would be in the common form, but which are in the particular case immaterial is of no moment. *Letheby and Christopher, Lims*, (1904) 1 Ch. 815. C
- (b) Where a transfer was executed by P to Company C of shares in Company B, and the intention of both parties was that P should transfer and Company C accept all the shares which P held; and at the time when P executed the transfer, and handed it to his agent, it contained no description of the shares; and before it left his agent's hands it was filled up with the number of the shares, being all P's shares, and with the description of them as shares in the Company B, but the

f.—“The instrument of transfer....transferee”.—(Continued).

denoting members of the shares were not inserted; and the seal of the C Company was then affixed to it, and subsequently the denoting numbers and the date of transfer were filled in; this was a good transfer. *E.P. Contract Corporation*, 3 Ch. 105. **D**

- (c) So, the fact of a transfer to a company not having been accepted by the company under its seal has been held immaterial. *Royal Bank of India's Case*, 7 Eq. 91. **E**

- (d) Again, where L, executed to W a transfer of shares, and the transfer was registered as of the 23rd of August, and it appeared that L was not at the time the registered holder of any shares, but held transfers to himself of a corresponding number of shares, which last-mentioned transfers appeared from the books to have been sent into the company's office on the 5th September, but were registered as on the 30th of August the errors and irregularities in the registration did not affect the validity of the transfer to W. *Weikershiem's case*, 8 Ch. 831, 837, 839. **F**

- (e) Moreover, although the articles or deed of settlement of a company may require certain formalities in respect of transfers, yet if the company have regularly adopted a course of dealing not in accordance with these formalities transfers executed and passed in accordance with such usage, although invalid at law, may not afterwards be capable of being impeached in equity. *Shortridge v. Bosanquet*, 16 Beav. 84. **G**

N.B.—But in respect of a due observance of formalities director is more strictly treated. *E. P. Brown*, 19 Beav. 97. **G-I**

- (f) And where a transfer through non-observance of formalities has been irregularly, though not invalidly made, lapse of time, coupled with recognition of the transferee as a share-holder, may render the transfer incapable of being impeached. *Bush's case*, 6 Ch. 246. **H**

- (g) Thus where the articles require transfers to be executed by the transferee, a transfer which has not been so executed but has been received and acted upon cannot be impeached. *Taurine Co.*, 25 Ch. Div. 118. **I**

- (h) But the contrary is not necessarily the case; where the usage has been to require formalities in excess of the stipulation of the articles a transfer not executed with such formalities will not necessarily be invalid. Thus, where it had been the practice of the company to require transfer by deed, a transfer in blank was nevertheless held to convey the legal interest. *E. P. Sargent*, 17 Eq. 273. **J**

N.B.—But in an earlier case, in a company whose articles excluded Table A, and did not define any formalities for transfer the directors were held justified in refusing to register a transfer not executed by the transferee. *Marianoo's case*, 2 Ch. 596. **K**

(8) Denoting numbers of shares—Irregularities.

- (a) Where an agreement is shewn, an error in the distinguishing numbers of the shares is immaterial. For the numbers are simply directory for the purpose of enabling the title of particular persons to be traced. One share, being an incorporeal right to a certain portion of the profits of the company, is the same as another (a). If, therefore, a transferor has the number of shares which he professes to transfer, or a large

1.—“The instrument of transfer....transferee”—(Continued).

number, and by mistake the wrong distinguishing numbers are put in the transfer. That will not prevent the number of shares purported to be transferred from passing to the transferee. *Ind's case*, 7 Ch. 485. L

(b) So also where the numbers are not inserted till after execution. *Bishop's case*, J. Ch. 295 (n). M

(c) Likewise if the numbers are not inserted at all. *Letheby and Christopher*, Lim., (1904), 1 Ch. 815. N

(9) Person not holding any numbered shares.

A person may be a share-holder who does not hold any numbered shares. *Porter v. Emmens*, 1 C.P.D. 201, 211. O

(10) Irregularities, transfer held invalid for.

Since the validity of a transfer depends upon the agreement to transfer and to accept the shares purporting to be transferred, it follows that if the transfer be filled up with shares which [the transferor did not agree to transfer. [*Taylor v. Great Indian Peninsula Railway Co.*, 4 De. G. & J. 559.] Or with shares which the transferee did not agree to accept, is a forgery, such transfer is a nullity. *Balkely Ordnance Co.*, *Bailey's case*, (1869) W.N. 196; *Barton v. North Staffs. Railway Co.*, 38 Ch. D. 458. P

(11) Shares transferable by delivery.

Companies whose articles have allowed the issue of shares, are transferable by delivery, however, nonetheless liable to be wound up, at any rate if there be also shares not so transferable. *General Co. for promotion of land credit*, 5 Ch. 363. Q

(12) Petition of scrip-holder—Winding-up order.

A winding-up order has even been made upon the petition of a scrip-holder. *Littlehampton Steamship Co.*, 34 Beav. 256. R

(13) Persons liable in respect of such shares.

As respects the persons liable in respect of such shares, this must in each case depend upon the effect of the provisions of the articles. If these are such as to constitute the original allottee of the scrip or warrant a member of the company, then, as between himself and the company, such allottee would probably be held liable as a contributory; and a transfer by delivery would merely create an equitable contract upon which, as between transferor and transferee the former might claim an indemnity from the latter in respect of calls which the transferor had, as contributory, been called upon to pay. See *Gregg's case*, 15 W.R. 82. S

But, on the other hand, the effect of the articles may be such as to give the allottee of scrip merely a right to become, in certain events, a share-holder; and, if such events have not taken place, it may be that no person is liable in respect of shares which have not in fact even been allotted. *Ormerod's case*, 5 Eq. 110. T

1.—“*The instrument of transfer....transferee*”—(Concluded).

It is submitted that the creation of such shares would not be illegal in such sense as to deprive the transferor by delivery of his remedy over against his transferee; for the meaning of the articles may be merely this, that the company will accept the bearer of the scrip certificate as a share-holder if the allottee comes in and duly executes a transfer; but until that is done the allottee remains a member, and is liable. See, however, 5 Ch. 377; *McBuen v. West London Wharves Co.*, 6 Ch. 655, 662. U

(14) Transfer by non-members.

Transfers may in certain cases be executed by persons who are not members of the company, but who have by devolution become entitled to shares, Art. 14, *infra*. Y

(15) Successive transfers of same shares.

The mere execution of a transfer does not pass the title to the shares. After a transfer has been executed to A, but not registered, a subsequent transfer to B, may be effectual, and if registered may pass the shares to B, although if A was a purchaser for value he no doubt could restrain the registration of the transfer to B. *Nanney v. Morgan*, 37 Ch. Div. 346, 354. W

(16) Dividend as between transferor and transferee.

A sale of shares made without any special condition as to dividend carries to the purchaser any dividend which is, so to say, *in gremio* the share at the date of the sale, although payable in respect of a period anterior to that date. Thus, where sale was made on the 1st of August and on the 28th of August a dividend belonged to the purchaser. *Black v. Homersham*, 4 Ex. D. 24. X

(17) Transfer not duly stamped—Registration.

The directors may refuse to register a transfer which is not duly stamped, for they could not in a Court of justice rely on such a transfer. In determining whether it is duly stamped or not they may go behind that which on the face of the document purports to be the consideration. *Maynard v. Cons. Kent Collieries*, (1903) 2 K.B. 121. Y

(9) Shares in the Company shall be transferred in the following form:—

I, *A B*, of _____, in consideration of the sum of rupees _____ paid to me by *C D*, of _____, do hereby transfer to the said *C D* the share (or shares) numbered _____ standing in my name in the books of the _____ Company, to hold unto the said *C D*, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said *C D*, do hereby agree to take the said share (or shares) subject to the same conditions. As witness our hands the _____ day of _____

(Notes).

(1) Corresponding English Law.

Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve :

I, A.B. of.....in consideration of the sum of £..... paid to me by C.D. of (hereinafter called "the said transferee") do hereby transfer to the said transferee the share (or shares) numbered.....in the undertaking called the.....Company, Limited, to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution thereof : and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid. As witness our hands the day of

Witness to the signatures of, etc. Z

[Art. 19, Table A., Sch. I, The English Companies (Consolidation) Act, 1908.]

(2) Use of the form—Scope of the clause.

The use of this form is not made compulsory if the directors approve of a substantial form, but it seems the directors may reject any transfer not in this form. It does not require execution as a deed, but provides for a witness. Attestation should never be omitted, but where a deed is not required it is not essential to the validity of the assignment or transfer. An unattested transfer would not be in any "usual or common form," and should not be approved by the directors. The clause is directory only, and the omission of particulars such as the numbers of the shares, if in the circumstances not material, will not entitle the directors to refuse to register the transfer. [*Re Letheby and Christopher*, (1904), 1 Ch. 815.] A

(3) Omission from common form of particulars immaterial to transfer.

The omission from the common form of particulars, which in the case of the transfer in question are immaterial, is of no moment. [*Letheby and Christopher*, Lim. (1904), 1 Ch. 815.] B

(4) Transferee stepping into shoes of transferor.

A question upon which there is at present little authority is how far the transferee steps into the shoes of his transferor so as to be bound by all acts (e.g., of acquiescence) of his transferor. The transferee gets upon registration a legal title, and the question is not one of equities. The point was raised and not decided in *Ashbury v. Watson*, 30 Ch. Div. 376. C

(10) The Company may decline to register any transfer of shares made by a member who is indebted to them.

(Note).

Corresponding English Law.

Cf. first sentence in Art. 20, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. D

(11) The transfer-books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

(Note).

Corresponding English Law.

This is almost similar to the second sentence in Art. 20, Table I, Sch. I, The English Companies (Consolidation) Act, 1908. E

Transmission of shares.

(12) The executors or administrators of a deceased member shall be the only persons recognized by the Company as having any title to his share ¹.

(Notes).

Corresponding English Law.

This article is almost similar to the first sentence in Art. 21, Table A, Sch. I of the English Companies (Consolidation) Act, 1908, with this difference that for the term "member" the expression "sole holder of a share" is used in the English Enactment. F

*1.—"The executors... his share."***(1) Member of Joint-Stock Company, whether a partner—Death of member.**

(a) In the legal sense a member of a joint-stock Company is not a partner with his co-members. See *Baird's case*, 5 Ch. 725, 735. G

(b) His death does not dissolve his connection with the Company. (*Ibid.*) H

(c) Till something is effected for transferring the interest, the dead shareholder—i.e., his estate—remains a member. (*Ibid.*) I

(d) His representatives are entitled to receive dividends. Cf., *Bombay Burma Company v. Smith*, 21 Ind. App. 139. J

(e) His representatives are liable for calls. *James v. Buena Ventura, Syndicate*, (1896), 1 Ch. 456. K

(f) A notice served at the registered address of the dead-shareholder will (if the Company is not aware of his death) have the same effect (in the absence of the express provisions to the contrary in the articles) as if he were living. *New Zealand Gold Co. v. Peacock*, (1894), 1 Q.B. 622. L

N.B.—See *Allen v. Gold Reeve*, (1900), 1 Ch. 656, 670, from which it would seem that where the articles merely require notice of meetings to be given to members, no such notice need be sent either to the dead-man's address or to his executors.

(2) Estate of deceased share-holder—Company—Payment.

As between the deceased share-holder and the Company the estate of the deceased share-holder is liable to the same extent as the share-holder himself would have been liable if living. Out of his estates must be paid calls made in his lifetime and also those made after his death as long as the shares are left in his name, and as respects the latter the liability is not confined to obligations incurred prior to his death. See *Baird's case*, *supra*; *Blakeley's case*, 13 Beav. 193. M

N.B.—As between the parties beneficially interested in the estate of the share-holder, specific legatees of shares must pay calls made after, while the residuary estate must pay calls made before, the death of the testator. See *Adams v. Ferick*, 26 Beav. 384. N

1.—“The executors....his share”—(Concluded).

(3) Disadvantage under which Company is placed, how escaped.

(a) “To escape the disadvantage under which the Company is thus placed in having representative members, whose liability is limited by the amount of the assets of their testator, provisions are commonly introduced into articles putting upon executors pressure either to transfer their testator's shares, or to become in their own persons proprietors of them, by attaching the penalty of forfeiture to a neglect to do either the one or other within a limited time.” [See Buckley, on Companies, 9th Ed., p. 585.] O

(b) But until the executors either personally accept or validly dispose of the shares, the estate of the deceased share-holder remains liable. *Lancey's case*, (Eur. Arb.) Reil, 12 L.T. 15. P

(c) So also until the forfeiture is declared. *Heward v. Wheatley*, 3 D. M. & G. 628. Q

(d) Upon a deficiency of the personal estate, according to the English Law, the real estate may, in the hands of devisees be rendered liable in equity for the payment of his calls. *Turquand v. Karby*, 4 Eq. 123. R

(4) Testator's estate—Executors—Contributories.

(a) In respect of their testator's estate the executors may be placed on the list of contributories.

(b) If they make default in payment of calls, according to the English Law, the personal and real estates may be administered. See Ss. 126 and 154, *supra*. S

(5) Executors personally accepting shares—Liabilities.

(a) Where executors personally accept the shares, they become as between themselves and the Company the persons liable. Buckley on Companies, 9th Ed., p. 586. T

(b) But they can execute a transfer without incurring such liabilities. (*Ibid.*) U

(6) Transfer in name of executor—Executor personally liable—When.

Before shares can be transferred into the name of an executor so as to render him personally liable, there must be shown a distinct and intelligent request by him that the shares should be dealt with in that way. The executor bears a representative character, and if he simply sends the probate in to be noted, so that his title may be recorded and recognized, this may be done without making him personally liable. *Buchan's case*, 4 A.C. 549, 588, 589, 594. Y

(13) Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may, from time to time, be required by the Company.

(Notes).

(1) Corresponding English Law.

Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right either

to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy. [Art. 22, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] W

(2) **Executor claiming to be registered as member.**

Where the executor claims the right to be registered as a member, the company is not entitled to add upon the register that he is the executor. *Saunders & Co.*, 1908, 1 Ch. 415. X

(14) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

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Cf. Art. 22, Table A, Sch. I, The Companies (Consolidation) Act, 1908, noted under Art. 13, *supra*. Y

(15) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

(16) The instrument of transfer shall be presented to the Company, together with such evidence as the directors may require to prove the title of the transferee, and thereupon the Company shall register the transferee as a member.

Forfeiture of Shares .

(Notes).

I.—“Forfeiture of Shares.”

(1) **Forfeiture, powers of, whether valid.**

Powers of forfeiting shares are usual, and if duly and *bona fide* called into operation, perfectly legal. *Marshall v. Glamorgan Iron and Coal Co.*, 7 Eq., 129, 136. Z

(2) **Power to accept surrender.**

- (a) A ——— of shares may under circumstances be good. *Snell's case*, 5 Ch. 22. A
- (b) It can, however, be employed only under circumstances which would justify a forfeiture. *Bellerby v. Rowland*, (1902), 2 Ch. 14, 23, 24, 29, 31, 32. B
- (c) It cannot be used to bring about that which is equivalent to a purchase by the Company of its own shares. (*Ibid.*) C

1.—“Forfeiture of shares”—(Continued).

(3) *Ibid.*—to be construed strictly.

A power to accept a surrender will be construed strictly; when a forfeiture has been incurred it may be used to carry it into effect where the member is willing, without going through all the formalities; but not to give validity to a forfeiture collusively arranged between the directors and a share-holder. *Hall's case*, 5 Ch. 707. D

(4) *Ibid.*—Forfeiture, power of.

The power to forfeit and the power to accept surrenders are distinct, and the former will not justify a surrender being made which if made without express power will be invalid. *Hall's case*, (1870), 5 Ch. 507; *Ex parte Trading Co.*, (1879), 12 Ch. D. 191. E

(5) Forfeiture, power of, invalid except as authorised by the articles.

(a) A share-holder can only cease to be a share-holder in manner authorised by the Act, and by the regulations of the company. If the articles do not authorize forfeiture, neither the directors, nor the company in general meeting, can make a valid declaration of forfeiture. *Barton's case*, 4 Drew. 535; 4 De. G. & G. 46. F

(b) The directors can only bind the share-holders by acts coming within the authority given them by the articles; except as authorized by, and strictly for the purposes contemplated by the regulations, the releasing of share-holders from liability is not within their power. *Stanhope's case*, 1 Ch. 161, 169; and the cases in the *Agriculturists' Cattle Insurance Co.*, *E. G. Spackman v. Evans*, L.R. 3 H.L. 171; *Evans v. Small Combe*, *Ibid.*, 249; *Houldsworth v. Evans*, *Ibid.*, 263; *Dixon v. Evans*, L.R. 5 H.L. 606. G

(6) Forfeiture—*Strictissimi juris*.

Where a power of forfeiture exists, it is to be treated as *strictissimi juris*. *Clare v. Hart*, 6 H.L.C. 633. H

(7) Forfeiture—Conditions precedent—Compliance.

(a) A very little inaccuracy in complying with the conditions precedent to a forfeiture, is as against the company as fatal as the greatest. *Johnson v. Lytle's Iron Agency*, 5 Ch. Div. 687. I

(b) If the company rely upon the forfeiture as valid, they must shew that all conditions precedent have been complied with; except that if the share-holder lie by for more than six years, he may be precluded from asserting a claim. *Pule v. Jewell*, 18 Ch. D. 660. J

(c) If it is the share-holder who relies upon it as against the company, who seeks to say that it is invalid, this is another matter. See *infra*. K

(8) Forfeiture, powers of, invalid except as authorised by the articles as altered by special resolution.

(a) If the articles do not contain a power of forfeiture, the company may by special resolution vary its articles and take such power, provided the resolution be passed *bona fide* for the benefit of the company, and not to enable share-holders to escape liability. *Teasdale's case*, 9 Ch. 54. (But it should be observed that in this case the effect of the resolution was to increase the available capital of the company.) L

to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy. [Art. 22, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] W

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(a) A share-holder can only cease to be a share-holder in manner authorised by the Act, and by the regulations of the company. If the articles do not authorize forfeiture, neither the directors, nor the company in general meeting, can make a valid declaration of forfeiture. *Barton's case*, 4 Drew. 535; 4 De. G. & G. 46. F

(b) The directors can only bind the share-holders by acts coming within the authority given them by the articles; except as authorized by, and strictly for the purposes contemplated by the regulations, the releasing of share-holders from liability is not within their power. *Stanhope's case*, 1 Ch. 161, 169; and the cases in the *Agriculturists' Cattle Insurance Co.*, *E. G. Spackman v. Evans*, L.R. 3 H.L. 171; *Evans v. Small Combe*, *Ibid.*, 249; *Houldsworth v. Evans*, *Ibid.*, 263; *Dixon v. Evans*, L.R. 5 H.L. 606. G

(6) Forfeiture—*Strictissimi juris*.

Where a power of forfeiture exists, it is to be treated as *strictissimi juris*. *Clare v. Hart*, 6 H.L.C. 633. H

(7) Forfeiture—Conditions precedent—Compliance.

(a) A very little inaccuracy in complying with the conditions precedent to a forfeiture, is as against the company as fatal as the greatest. *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687. I

(b) If the company rely upon the forfeiture as valid, they must shew that all conditions precedent have been complied with; except that if the share-holder lie by for more than six years, he may be precluded from asserting a claim. *Pule v. Jewell*, 18 Ch. D. 660. J

(c) If it is the share-holder who relies upon it as against the company, who seeks to say that it is invalid, this is another matter. See *infra*. K

(8) Forfeiture, powers of, invalid except as authorised by the articles as altered by special resolution.

(a) If the articles do not contain a power of forfeiture, the company may by special resolution vary its articles and take such power, provided the resolution be passed *bona fide* for the benefit of the company, and not to enable share-holders to escape liability. *Teasdale's case*, 9 Ch. 54. (But it should be observed that in this case the effect of the resolution was to increase the available capital of the company.) L

to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy. [Art. 22, Table A, Sch. I, The English Companies (Consolidation) Act, 1903.] W

(2) **Executor claiming to be registered as member.**

Where the executor claims the right to be registered as a member, the company is not entitled to add upon the register that he is the executor. *Saunders & Co.*, 1908, 1 Ch. 415. X

(14) Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

(Note).

• **Corresponding English Law.**

Cf. Art. 22, Table A, Sch. I, The Companies (Consolidation) Act, 1908, noted under Art. 13, *supra*. Y

(15) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

(16) The instrument of transfer shall be presented to the Company, together with such evidence as the directors may require to prove the title of the transferee, and thereupon the Company shall register the transferee as a member.

Forfeiture of Shares .

(Notes).

1.—“*Forfeiture of Shares.*”

(1) **Forfeiture, powers of, whether valid.**

Powers of forfeiting shares are usual, and if duly and *bona fide* called into operation, perfectly legal. *Marshall v. Glamorgan Iron and Coal Co.*, 7 Eq., 129, 136. Z

(2) **Power to accept surrender.**

(a) A ——— of shares may under circumstances be good. *Snell's case*, 5 Ch. 22. A

(b) It can, however, be employed only under circumstances which would justify a forfeiture. *Bellerby v. Rowland*, (1902), 2 Ch. 14, 23, 24, 29, 31, 32. B

(c) It cannot be used to bring about that which is equivalent to a purchase by the Company of its own shares. (*Ibid.*) C

I.—“Forfeiture of shares”—(Continued).

(3) *Ibid.*—to be construed strictly.

A power to accept a surrender will be construed strictly; when a forfeiture has been incurred it may be used to carry it into effect where the member is willing, without going through all the formalities; but not to give validity to a forfeiture collusively arranged between the directors and a share-holder. *Hall's case*, 5 Ch. 707. **D**

(4) *Ibid.*—Forfeiture, power of.

The power to forfeit and the power to accept surrenders are distinct, and the former will not justify a surrender being made which if made without express power will be invalid. *Hall's case*, (1870), 5 Ch. 507; *Ex parte Trading Co.*, (1879), 12 Ch. D. 191. **E**

(5) Forfeiture, power of, invalid except as authorised by the articles.

(a) A share-holder can only cease to be a share-holder in manner authorised by the Act, and by the regulations of the company. If the articles do not authorize forfeiture, neither the directors, nor the company in general meeting, can make a valid declaration of forfeiture. *Barton's case*, 4 Drew. 535; 4 De. G. & G. 46. **F**

(b) The directors can only bind the share-holders by acts coming within the authority given them by the articles; except as authorized by, and strictly for the purposes contemplated by the regulations, the releasing of share-holders from liability is not within their power. *Stanhope's case*, 1 Ch. 161, 169; and the cases in the *Agriculturists' Cattle Insurance Co.*, *E. G. Spackman v. Evans*, L.R. 3 H.L. 171; *Evans v. Small Combe*, *Ibid.*, 249; *Houldsworth v. Evans*, *Ibid.*, 263; *Dixon v. Evans*, L.R. 5 H.L. 606. **G**

(6) Forfeiture—*Strictissimi juris*.

Where a power of forfeiture exists, it is to be treated as *strictissimi juris*. *Clare v. Hart*, 6 H.L.C. 633. **H**

(7) Forfeiture—Conditions precedent—Compliance.

(a) A very little inaccuracy in complying with the conditions precedent to a forfeiture, is as against the company as fatal as the greatest. *Johnson v. Lytle's Iron Agency*, 5 Ch. Div. 687. **I**

(b) If the company rely upon the forfeiture as valid, they must shew that all conditions precedent have been complied with; except that if the share-holder lie by for more than six years, he may be precluded from asserting a claim. *Pule v. Jewell*, 13 Ch. D. 660. **J**

(c) If it is the share-holder who relies upon it as against the company, who seeks to say that it is invalid, this is another matter. See *infra*. **K**

(8) Forfeiture, powers of, invalid except as authorised by the articles as altered by special resolution.

(a) If the articles do not contain a power of forfeiture, the company may by special resolution vary its articles and take such power, provided the resolution be passed *bona fide* for the benefit of the company, and not to enable share-holders to escape liability. *Teasdale's case*, 9 Ch. 54. (But it should be observed that in this case the effect of the resolution was to increase the available capital of the company.) **L**

1.—“*Forfeiture of shares*”—(Continued).

(b) ARTICLES OF ASSOCIATION WHICH EXCLUDE TABLE A, FIRST SCHEDULE.

Similar provisions re forfeiture of shares may be inserted in.....*Trevor v. Whitworth*, (1887) 12 App. Cas. 409; *Bellerby v. Rowland and Manwood's Steamship Company, Ltd.*, (1902), 2 Ch. 14 I.C.A. **M**

The power may be given or extended by altering the articles. *Allen v. Gold Reef of West Africa, Ltd.*, (1900) 1 Ch. 656, C.A. **N**

(9) **Forfeiture may be rendered valid by acquiescence.**

(a) A forfeiture of shares which is not illegal as in contravention of any statute but may have been *ultra vires* the directors, as being unauthorized by the articles, may be made good if it be shown that every individual share-holder had knowledge of and acquiesced in the transaction. *Brotherhood's case*, 31 L.J. Ch. 861; 31 Beav. 365; 8 Jur. (N.S.) 926. **O**

(b) Where the articles of association provided that “no agreement entered into by the directors...to which the assent of the company in general meeting shall be given, shall be afterwards impeached...by reason that the same is not within...the business and objects of the company,” but contained no power to cancel shares, a contract entered into by the directors with a share-holder, and assented to by the company in general meeting, that the directors would forthwith cancel his shares, was valid :—for by the terms of the articles it was unimpeachable, and was to be taken as acquiesced in by every member of the company. *Marshall v. Glamorgan Iron and Coal Co.*, 7 Eq., 129. **P**

(10) **Forfeiture, leading cases on the subject of.**

The———of shares are those in the *Agriculturists Cattle Insurance Co.*, *supra*. **Q**

N.B.—(Whether the authority of these cases, decided under 7 & 8 Vict., C. 110, is on the question of acquiescence and ratification equally applicable to cases falling under the English Comp. Act. 1862, see *Riche v. Ashbury Railway Carriage Co.*, L.R. 9 Ex. 224, 266, 289.)

(11) **Forfeiture—Exercise of power of must be for benefit of company and bona fide.**

(a) A power of forfeiture is a power intended to be exercised only when the circumstances of the share-holder render its exercise expedient for the interests of the company; it is not a power to be exercised for the benefit of the share-holder. The duty of the directors, when a call is made, is to compel every share-holder to pay the company the amount due from him in respect of that call, and it is only when payment cannot be obtained that the power of forfeiture is to be resorted to. *Stanhope's case*, 1 Ch. 161, 169; *Spackman v. Evans*, L.R. 3 H.L. 171. **R**

(b) A forfeiture of shares under a valid power to forfeit is void unless it is for the company's benefit. *Harris v. North Devon Railway Co.*, (1885), 20 Beav. 384. **S**

N.B.—As to forfeiture being void when made to relieve a share-holder from liability, see *re London and County Assurance Co.*, *Ex parte Jones*, (1858), 27 L.J. (Ch.) 666.

The power must be exercised *bona fide* for the good of the company, not to relieve a share-holder from liability. *Richmond's case*, *Painter's case*, 4 K. & J. 805, 325. **T**

I.—“Forfeiture of shares”—(Continued).

- (c) Powers given to directors for one purpose cannot be used by them for another and a different purpose. *Bennet's case*, 5 D. M. & G. 284, 298. **U**
- (d) Although the share-holder in whose favour the forfeiture is declared has no knowledge that the power is being used improperly, yet when he comes to claim the benefit of it, the transaction becomes a collusive one and invalid. *Manisty's case*, (Fur. Arb.), L.T. 87; 17 Sol. J. 745. **Y**
- (e) Therefore if, under any circumstances, a forfeiture is declared, not by way of adverse sentence against the share-holder, but by way of collusive contract with him—whether it be to enable him to avoid his liability, or be *bona fide*, with a view to putting an end to disputes between him and the directors and as part of a *bona fide* compromise—such forfeiture is a fraud on the power and invalid. Any forfeiture in which there is *aliud simulatum aliud actum*, is invalid. *Spackman's case*, 34 L.J. (Ch.) 321. *Spackman v. Evans*, L.R. 3 H.L. 171, 189. **W**
- (f) Thus the forfeiture of the shares of a member, who alleged that he was entitled to repudiate his shares on the ground of fraud, or misrepresentation was invalid. *Gower's case*, 6 Eq. 77. **X**
- (g) Where a director took shares for the purpose of enabling the company to obtain registration, on the understanding that no calls should be made upon them, and they were subsequently forfeited to relieve him from liability, he was fixed as a contributory for those shares. *London and County Assurance, E. p. Jones*, 27 L.J. (Ch.) 666. **Y**
- (h) So where upon certain persons ceasing to be directors, their shares were declared to be forfeited for non-payment of calls, in order to put an end to their liability, the forfeiture though *bona fide* was invalid. *Manisty's case* (Eur. Arb.), L.T. 87. **Z**
- (12) Forfeiture, if *ultra vires*, is not validated by lapse of time.
- (a) If a forfeiture be *ultra vires* no lapse of time alone can render it valid :—
Quod ab initio non valet, in tractu temporis non convalescit. Spackman v. Evans, L.R. 3 H.L. 171. **A**
- (b) As regards a forfeiture which is *ultra vires* the directors : “If a declaration of forfeiture proceeds upon and is the result of a collusive agreement, but is entered by the directors in the books of the company as if it were a *bona fide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the truth, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances of imposition on the other shareholders that the share-holder who sets up the forfeiture can make a case of acquiescence or derive any benefit from lapse of time whilst the truth remains unknown.” *Per Westbury, L.C., in Spackman's case*, 34 L.J. (Ch.) 321, 330. **B**
- (c) If the shares are invalidly forfeited, the holder will remain a member of the company both as regards his liabilities and as regards his privileges, and time will not cure the defect. *Garden Gully United Quartz Mining Co. v. McLister*, (1875), 1 App. Ca. 39; *Bottomley's case*, (1881), 16 Ch.D. 681; *Ex parte Trading Co.*, (1879), 12 Ch.D. 191; *Bellerby v. Rowland & Manwood's Steamship Co.*, (1902), 2 Ch. 14. **C**

1.—“Forfeiture of shares”—(Continued).

(13) *Ibid.*—Unless acquiescence by every share-holder is shewn.

- (a) But if, upon a forfeiture which was *ultra vires* the directors and invalid, the transaction was communicated to, and acquiesced in by, every share-holder, or if the means of notice to all appear sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached for a great number of years; then that which was in its inception invalid, will by acquiescence be rendered unimpeachable. *Brotherhood's case*, 31 Beav. 365. D
- (b) As to what is a sufficient notice or means of notice to all the share-holders, it is by no means easy to lay down any general rule. It is not necessary or possible to prove the acquiescence of every individual share-holder, and it is probably enough to shew circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry. *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43. E
- (c) But it is not enough to shew merely that there was sufficient notice to rouse attention. *Ashbury Co. v. Piche*, L. R. 7 B. H. L. 553. F
- (d) Where certain rights in respect of dividend having been defined by the memorandum of association, the company passed special resolutions altering those rights, and dividends upon the altered terms were paid for eleven years, it was held that the alteration was *ultra vires*, and that (assuming that every share-holder could have agreed to vary his rights) ratification was not proved because full knowledge was not shewn. *Ashbury v. Watson*, 28 Ch. D. 56. G
- (e) By “acquiescence” is meant being content not to oppose. *Per Lord Cairns*, L. R. 3 H. L. 256, 265. H
- (f) In the absence of full information mere lapse of time cannot grow into acquiescence. Length of time may, in many cases, materially assist in establishing acquiescence; but it is not the time, but the acquiescence, which changes what would otherwise be a void act into a valid one. L. R. 3 H. L. 223, 260. I
- (g) Where it is sought to establish an invalid transaction as having been rendered valid by acquiescence, it must be shewn to come strictly within the terms of that arrangement which was communicated to and acquiesced in by the share-holders. Therefore, where it was an essential part of the proceeding that advantage should be taken of the arrangement before a certain date, forfeiture in the case of share-holders who came in after date was invalid. *Houldsworth v. Evans*, L. R. 3 H. L. 263. J

(14) Forfeiture, power to compromise does not authorize.

A power of compromise cannot be employed to enlarge a power of forfeiture. A power of compromise does not extend beyond some compromise within the competency of the directors. Directors cannot, under a power to compromise, agree to a compromise, one term of which is that shares shall be forfeited in a case where a valid forfeiture could not be made under the power of forfeiture. *Spackmans v. Evans*, L. R. 3 H. L. 171, 189, 231, 232. K

1.—“Forfeiture of shares”.—(Continued).

(15) *Ibid.*—Except in compromise of dispute, whether share-holder or not.

(a) But where there was a *bona fide* dispute whether B was a share-holder or not, a compromise by which the directors released him and forfeited his shares was good. For there was sufficient doubt as to B's liability to be treated as a share-holder, for the dispute between himself and the directors on the question to be a proper subject of compromise. *Lord Belhaven's case*, 12 L. T. 324, 595; 11 Jur. (N.S.) 572; 3 W. J. & S. 41. L

(b) *Quære*, whether in such a case, where the compromise was clearly for the benefit of the company, the directors would not have power, independent of authority given by the deed of settlement, to effect it. *Per Lord Westbury, Dixon v. Evans*, L. R. 5 H. L. 606, 618. M

(c) In confirmation of which it has since been held that a company has, as an incident to its existence, and independent of express power under its articles, the same power of compromising claims against it as an individual has, and that consequently a cancellation of shares by way of *bona fide* compromise of a dispute whether the shares had been legally issued or not was valid. *Baths's case*, 8 Ch. Div. 334. N

(d) Where a compromise is *bona fide*, that is, is not an instrument to carry into effect any ulterior or collateral purpose, but only seeks to do that which is within the very terms of the compromise, and where the claims on each side are *bona fide* and truly made, the Court, if satisfied that it is not manifestly *ultra vires* the parties, ought to respect it. *Per Lord Westbury Dixon v. Evans*, L. R. 5 H. L. 606, 618. O

(16) **Forfeiture—Specific performance of agreement to forfeit.**

Where directors, believing a share-holder to be of no means, have agreed with him to forfeit his shares upon terms but afterwards, finding him to have means, have refused to carry out the forfeiture, the Court will not compel specific performance of the contract. *Harris v. North Devon Railway Co.*, 20 Beav. 384. P

(17) **Forfeiture when complete.**

(a) If the articles provide that, upon non-payment of calls or upon default in doing any act, shares “shall become absolutely forfeited to the company,” the effect is that a default operates as a forfeiture, not *ipso facto*, but only at the option of the directors. *Moor v. Rawlins*, 6 C.B. (N.S.) 289, 310. Q

(b) So where the articles provided that, on default, any share “may be there-upon forfeited,” and a share-holder, having received a notice that on non-payment by a certain day his shares “would be forfeited without further notice,” paid the arrears on some, saying that he would submit to a forfeiture on the rest, it was held that the sharer on which the arrears were not paid were not thereby absolutely forfeited, but that the company's right of option remained; and the company having declared their intention of retaining the share-holder, he was made a contributory in the winding-up in respect of the full number of shares. *Bigg's case*, 1 Eq. 309. R

(18) **Forfeiture, prospective resolution for.**

A prospective resolution for forfeiture is not invalid. See *Wollaston's case*, 4 De G. & J. 437; 23 L. T. (Ch.) 721. S

I.—“Forfeiture of shares”—(Continued).

(19) Forfeiture, formal notice of, not given.

- (a) It is not in all cases necessary that the decision of the directors should be declared in a formal way; so that, where there had been no declaration of forfeiture sent to the share-holder, but the directors had in their balance-sheet treated the shares as forfeited, the application of the official manager in the winding-up to make the share-holder a contributory failed. *Webster's case*, 32 L.J. (Ch.) 135. T
- (b) Where, after allotment of shares, provisional certificates only were issued, which upon certain acts done by the allottee were to be exchanged for shares, but in default the rights attaching to the certificates were to be forfeited, an allottee who made default and did not exchange, was under no obligation to take shares, and his interest was forfeited. *Re Asiatic Banking Corporation, E. P. Collum*, 9 Eq. 236. U
- (c) If the articles provide that, upon forfeiture, notice shall be sent to the share-holder, absence of notice will not necessarily invalidate the forfeiture. For the provision as to notice may be directory only, and at any rate it will not lie in the mouths of the directors to say that the forfeiture is not complete. *Knight's case*, 2 Ch. 321. Y
- (d) Notice to the share-holder is not in all cases necessary. *Kell's case*, 9 Eq. 107.

A forfeiture is not made invalid by the fact that no notice is sent, even where the articles provided that notice of forfeiture must be given to the share-holder. *Kell's case*, *Count Phalen's case*, (1869) L. R. 929, 107, 117. W

- (e) If a company declare a forfeiture without observing formalities intended for the protection of the share-holder, they cannot hold the share-holder liable as a contributory, although they may be liable to him in damages. *New Chile Gold Co.*, 45 Ch. D. 598. X
- (f) Thus where there was an irregularity, (1) in the quorum of directors by whom a call was made; and (2) in the length of notice of the call, a forfeiture for non-payment of the call was nevertheless valid. *Phosphate of Lime Co.*, *Austin's case*, 24 L.T. 932. Y
- (g) If the articles provide for forfeiture by resolution of the directors, the Court will assume that the resolution was duly passed, if the forfeiture is found properly entered in the books, although there is no minute of the resolution. *Knight's case*, 2 Ch. 321. Z
- (h) If, upon a valid forfeiture, everything necessary has been done on the part of the share-holder, he will not be prejudiced by the default of the company in not taking his name off the register before winding-up. *Marshall v. Glamorgam Iron & Coal Co.*, 7 Eq. 129; *Lyster's case*, 4 Eq. 233. A
- (i) The fact that the name of a subscriber of the memorandum has not been actually entered on the register, and that therefore no specified shares have ever been allotted to him, does not prevent the application to him of a power of forfeiture. *Snell's case*, 5 Ch. 22. B
- (j) But where a person has entered into an agreement to take shares, the directors have not, apart from the articles, power to release him because he has not become the holder of specified shares. *Adam's case*, 5 Ch. 22. C

1.—“Forfeiture of shares” —(Continued).

(k) And if the transaction be not an exercise of the power of forfeiture, but something else—as where by deed the subscriber was released from liability in respect of some shares, and indemnified against all past liability in respect of them—this was ineffectual, for it was in fact not a forfeiture, but a dealing in shares by the company. *Hall's case*, 5 Ch. 707. **D**

(l) It will be a consideration, in determining the validity of an alleged forfeiture, whether the parties are bargaining at arm's length or not. *Snell's case*, 5 Ch. 22; *Hall's case*, 5 Ch. 707. **E**

(m) A forfeiture made by two directors out of six, two being the number of directors who usually conducted the business of the company, was good. *Lyster's case*, 4 Eq. 233. **F**

(20) Forfeiture, power if not lost.

The power to forfeit is not lost by the uncalled capital being charged in favour of debenture-holders. *Re Agency Land & Finance Co. of Australia*, *Bosanquet v. Agency Land & Finance Co. of Australia*, (1903) 20 T. L. R. 41. **G**

(21) Forfeiture—Injunction.

(a) A forfeiture which is invalid, or oppressive, may be restrained by injunction. *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687; *Goulton v. London Architectural Co.*, 1877, W. N. 41. **H**

(b) When notice of intended forfeiture for non-payment of a call is given, and the share-holder commences an action for rescission for misrepresentation, the Court will restrain the Company from forfeiting on the share-holder giving an undertaking in damages and paying into Court the amount of the call with interest. *Lamb v. Sambar Rubbers & Gutta Percha Co., Ltd.* (1908) 1 Ch. 545. **I**

(22) Forfeiture, when share-holder may set aside.

(a) A share-holder may bring an action on behalf of himself and all other share-holders to annul the forfeiture of his shares. *Sweny v. Smith*, 7 Eq. 324 [but not to be relieved of his shares on the ground of misrepresentation]. *Hallows v. Fernie*, 3 Ch. 467. **J**

(b) Or if the forfeiture be *ultra vires* the company he may bring such an action in his own name merely. *Bellerby v. Rowland*, (1902) 2 Ch. 14. **K**

(b-1) A share-holder induced to take shares by fraud may, even after a forfeiture, repudiate the bargain and defend an action for calls. *Aaron's Reefs v. Twiss*, (1896) App. Ca. 273. **L**

(c) If the company is in liquidation the question may be raised by summons. *Alma Spinning Co., Bottemley's case*, 16 Ch. D. 681. **M**

(d) And if the shares cannot be restored to the share-holder he may in the winding-up be admitted as a creditor for damages. *New Chile Co.*, 45 Ch. D. 598. **N**

(e) Where a share-holder sent a cheque in payment of calls due, subject to a protest which was held to be of no effect, this was a good tender of payment, and the forfeiture of his shares was invalid. See *Sweny v. Smith*, 7 Eq. 324. **O**

I.—“Forfeiture of shares”.—(Concluded).

- (f) Where tender of payment was made at the company's office on the last day limited for payment, and the manager, handing the messenger a blank form of receipt to be filled up by the bankers, told him to pay it into the bank to the company's account, but the messenger arrived at the bank a few minutes after banking hours, and therefore, did not pay the cheque in until the next day, the payment was in time. *Clarke's case*, 27 L. T. 843; 21 W. R. 429; 42 L. J. (Ch.) 277. P

(28) Forfeiture not allowed to be questioned in bankruptcy.

Notice was on the 25th of November, 1867, sent to A that in default of payment of arrears on the 2nd of December his shares would be forfeited. On the 29th of November A was adjudicated bankrupt, and that the validity of the forfeiture could not be questioned in bankruptcy, but must be tried in an independent proceeding. *B. P. Rippon, Re Andrew*, 4 Ch. 639. Q

(17) If any member fails to pay any call on the day appointed for payment thereof, the directors may at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call together with interest¹ and any expenses that may have accrued by reason of such non-payment.

(Notes).

[N.B.—See Notes under “Forfeiture of shares”, *supra*.]

Corresponding English Law.

If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued. (Art. 24, Table A, Sch. I, The English Companies Consolidation Act, 1908.) R

I.—“Interest.”

Interest.

—is not recoverable unless expressly provided for—. See *Stocken's case*, (1868) 3 Ch. App. 412.

If the words of the article are “with interest if any thereon”, interest is recoverable from the date when the call was payable till forfeiture. *Faure Electric Accumulator Co. v. Phillimore*, (1888) 58 L.T. 525. S

(18) The notice shall name a further day¹ on or before which such call and all interest and expenses that have accrued by reason of such non-payment are to be paid. It shall also name the place where payment is to be made, the place so named being either the registered office of the Company or some other place at which calls of the Company are usually made payable. The notice shall also state that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited.

(Notes).

[N.B.—See, also, Notes under "Forfeiture of shares," *supra*.]

(1) Corresponding English Law.

The notice shall name a further day (*not earlier than the expiration of fourteen days from the date of the notice*) on or before which the payment required by the notice is to be made, and shall state that in the event of nonpayment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited. (Art. 25, Table A, The English Companies Consolidation Act, 1908.) T

(2) Clause, penal.

This clause being penal, all its requirements must be most carefully followed to render a forfeiture valid. *Gore-Browne and Jordan, on Joint-Stock Companies*, 30th Ed., p. 518. U

(3) Inaccuracy in complying with conditions precedent—Effect.

A very little inaccuracy in complying with the conditions precedent to a forfeiture, is as against the company as fatal as the greatest. *Johnson v. Lyttle's Iron Agency*, 5 Ch. Div. 687. Y

(4) Company to show compliance with condition precedent.

(a) If the company rely upon the forfeiture as valid, they must shew that all conditions precedent have been complied with; except that if the share-holder lie by for more than six years he may be precluded from asserting a claim. *Rule v. Jewell*, 18 Ch. D. 660. W

(b) If it is the share-holder who relies upon it as against the company, who seek to say that it is invalid, this is another matter. See *supra*. X

I.—"The notice....day."

Notice.

Where there was a right of forfeiture on giving ten clear days' notice, a notice posted on the 27th and received on the 28th of February to forfeit "on Monday the 9th of March," the 9th being a Friday, was insufficient. *Watson v. Eales*, 23 Beav. 294. Y

(19) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited by a resolution of the directors¹ to that effect.

(Notes).

[N.B.—See Notes under "Forfeiture of shares," *supra*.]

Corresponding English Law.

If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect. (Art. 26, Table A, Sch. I, The English Companies Consolidation Act, 1908.) Z

1.—“Be forfeited by a resolution of the directors.”

(1) Forfeiture, power of, treated as *strictissimi juris*.

Where a power of forfeiture exists, it is to be treated as *strictissimi juris*. *Clare v. Hart*, 6 H. L. C. 633. A

(2) Forfeiture, when made directors must see what?

When a forfeiture is about to be made, the directors must see, first, that they have the power to forfeit, and, secondly, that they conform very strictly to all the preliminaries prescribed by the articles. *Gore-Brown and Jordan on Joint-Stock Companies*, 30th Ed., p. 810. B

(3) Forfeiture, exercise of the power of—Caution to be observed.

(a) A forfeiture of shares may be attacked from two sides—(i) If the shares subsequently turn out valuable, the original owner may seek to have them restored to him; (ii) If there is a liability upon the shares, the creditors are interested to see that some one remains upon the register to meet the liability. Accordingly, great exactness is required. Forfeiture must be preceded by all the proper notices, containing all the matters prescribed by the articles, and giving all the time required. *Gore-Brown and Jordan on Joint-Stock Companies*, 30th Ed., p. 810. C

(b) It must be carried out by properly qualified and appointed directors. *Garden Gully United Quartz Mining Co. v. McLister*, (1875) 1 App. Cas. 89. D

(c) The due quorum must be present. *Bottomley's case*, (1881) 16 Ch. D. 681. E

(d) Moreover it must be for the cause intended by the article and not with a view to getting rid of an obnoxious share-holder, or with a view to relieving the owner of the shares of his liability. *Richmond and Painter's case*, (1858) 4 K. & J. 305; *Spackman v. Evans*, (1868) L.R. 3 H.L. 171. F

(e) In short, the power must be exercised alike for the benefit of the company and with strict justice to the share-holder. *Gore-Brown and Jordan on Joint-Stock Companies*, 30th Ed., p. 810. G

(4) Forfeiture by resolution of directors—Presumption.

If the articles provide for forfeiture by resolution of the directors, the Court will assume that the resolution was duly passed, if the forfeiture is found properly entered in the books, although there is no minute of the resolution. *Knight's case*, 2 Ch. 321. H

(20) Any share so forfeited shall be deemed to be the property of the Company, and may be disposed of¹ in such manner as the Company in general meeting thinks fit.

(Notes).

Corresponding English Law.

A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit. [Table A, Art. 27, Sch. I, The English Companies (Consolidation Act), 1903.] I

I.—“ May be disposed of.”

(1) Forfeited share, re-issuing of—Practice in England.

Forfeited shares may be re-issued as paid up to an amount not exceeding the amount paid by the previous holder, and may be so re-issued in consideration of a sum less than the sum credited as paid on them. *Morrison v. Trustees Corp.*, 1898, W. N. 154; 68 L. J. (Ch.) 11; 79 L. T. 605. J

(2) Forfeited share, liability of new holder of.

The new holder of a forfeited share will be liable to calls to the amount remaining unpaid on the share, including the amount which was the subject of the call for which the share was forfeited. *Buckley on the Companies (Consolidation) Act, 1908*, Ed. 9, p. 599. K

(21) Any member whose shares have been forfeited shall notwithstanding be liable¹ to pay to the Company all calls owing upon such shares at the time of the forfeiture.

(Notes).

[See Notes under S. 61, *supra*: Especially at pp. 194—196, *supra*.] L

Corresponding English Law.

A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares. [Table A, Art. 28, Sch. I, The English Companies (Consolidation) Act, 1908.] M

I.—“ Any member liable.”

(1) Forfeiture—Liability—Past-member.

- (a) Forfeiture does not exempt the holder of shares from liability as past-member. *Bridger's case and Neil's case*, (1869), 4 Ch. App. 266. N
- (b) Where there is under the articles a power to recover calls due at the time of forfeiture, a share-holder remains liable for a call made, but not payable before the date of forfeiture; for a call is owing on the day it is made, although it be payable on a subsequent day. *Dave's case*, 38 L. J. (Ch.) 512. O

(2) Forfeiture—Calls on forfeited shares—Liquidation—Past member of company—English Companies Act, 1862 (25 & 26 Vict. C. 89, S. 38).

The articles of association of a company provided that any member whose shares had been forfeited should, nevertheless, be liable to pay all calls owing upon the shares at the time of forfeiture. The defendant had been the owner of shares in the company, but his shares had been forfeited for non-payment of calls. More than a year after the forfeiture the company went into liquidation, and the defendant was then sued for the unpaid calls:—*Held*, that, notwithstanding the provisions of S. 38 of the English Companies Act, 1862, sub-Ss. 1, 2, the action was maintainable, inasmuch as the defendant was liable, not as a contributory, but as a debtor to the company. *Ladies Dress Association, Ltd. v. Pulbrook*. (1900) 2 Q. B. 376, cited in 2 Bom. L.R.J. 204. P

1.—“Any member....liable”——(Concluded).

(3) Defence to an action based on the article.

To an action based on this article it is a good defence that the contract to take shares was induced by fraud, and delay in seeking rescission of the contract after forfeiture is no reply to the defence, for as the defendant ceased to be a share-holder, it was not incumbent on him to take any active step to avoid the contract. *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 293, 295. Q

Semble, that, in the absence of a provision in the articles that calls owing at the time of forfeiture shall notwithstanding forfeiture be payable, proceedings at law to recover such calls will after forfeiture be incompetent, for such proceedings must stand on the footing that the person sued is a share-holder. *Stocken's case*, 5 Eq. 6. R

(22) A solemn declaration in writing, made before a Magistrate, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share, and such declaration and the receipt of the Company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to the purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

(Notes).

(1) Corresponding English Law.

A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase money, if any, nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture sale or disposal of the share. [Art. 29. Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] S

(2) Article, object of.

The object of this article is to enable the company upon the re-issue of forfeited shares to give the purchaser a good title not capable of being impeached on the ground of any irregularity in the forfeiture. *Newbaltis v. Randt Gold*, 1903, 1 K. B. 461; 1904, A. C. 165. T

Conversion of Shares into Stock.

(23) The directors may, with the sanction of the Company previously given in general meeting, convert any paid-up shares into stock.

(Notes).

(1) **Corresponding English Law.**

The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination. [Art. 31, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] U

(2) **Scope of the clause.**

Under this clause the sanction of an ordinary resolution will enable the directors to convert shares into stock. See Gore-Browne & Jordan, on Joint Stock Companies, 30th Ed., p. 519. Y

(24) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interest, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the Company may be transferred, or as near thereto as circumstances admit.

(Notes).

Corresponding English Law.

The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may from time to time fix the minimum amount of stock transferable and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose. [Art. 32, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] W

(25) The several holders of stock shall be entitled to participate in the dividends and profits of the Company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof, respectively, the same privileges and advantages for the purpose of voting at meetings of the Company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the Company; but so that none of such privileges, or advantages, except the participation in the dividends and profits of the Company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages.

(Notes).

Corresponding English Law.

The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage. [Art. 33, Table A, Sch. I, The Companies (Consolidation) Act, 1908.] X

Increase in Capital.

(26) The directors may, with the sanction of a special resolution of the Company previously given in general meeting, increase its capital by the issue of new shares; such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the Company in general meeting directs, or, if no direction is given, as the directors think expedient.

(Notes).

Corresponding English Law.

The directors may, with the sanction of an extraordinary resolution of the company, increase the share-capital by such sum to be divided into shares of such amount, as the resolution shall prescribe. [Art. 41, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] Y

(27) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members¹ in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the Company.

(Notes).

Corresponding English Law.

Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to *such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled.* The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined,

and, after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article. [Art. 42, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] Z

N.B.—This article (Art. 27) provides that the new shares should be offered to “the members.” Art. 42 of the English Act provides that the new shares should be offered to such persons as at the date of offer are entitled to receive.

I.—“Members.”

“Members,” what the term includes.

The term “members” includes the legal personal representatives of a member who dies between the date of the sanction of the increase of capital and the date of the offer, and *semble*, generally the representatives of a deceased member whose name remains on the register. *James v. Buena Ventura Syndicate*, (1896), 1 Ch. 456. A

(28) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions, with reference to the payment of calls and the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital.

(Notes).

Corresponding English Law.

The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share-capital. [Art. 43, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] B

General Meetings.

(29) The first general meeting shall be held at such time, not being more than six months after the registration of the Company, and at such place, as the directors may determine.

(Notes).

Corresponding English Law.

Cf. [Art. 45, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] C

(30) Subsequent general meetings¹ shall be held, once at the least in every year, at such time and place as may be prescribed by the Company in general meeting; and, if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

(Notes).

Corresponding English Law.

A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last proceeding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any members in the same manner as nearly as possible as that in which meetings are to be convened by the directors. [Art. 46, Table A, Sch. I, The English Companies (Consolidation) Act, 1908]. D

1.—“ Meetings.”

(1) One share-holder—Meeting.

One share-holder does not make a meeting. *Sharp v. Davies*, 2 Q.B. Div. 26. E

(2) Committee of Board of Directors.

But a Committee of a Board of Directors may consist of only one person. *Taurine Co.*, 25 Ch. Div. 118. F

(31) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(Note).

Corresponding English Law.

This article is word for word the same as Article 47, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. G

(32) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by not less than one-fifth in number of the members of the Company, convene an extraordinary general meeting ¹.

(Note).

Corresponding English Law.

The directors may, whenever they think fit, convene an extraordinary general meeting and extraordinary general meeting shall also be convened by such requisition, as provided by section sixty-six of the Companies (Consolidation) Act, 1908. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors. [Art. 47, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] H

1.—“ Extraordinary general meeting.”

(1) Meeting convened cannot be postponed.

When a meeting has been convened, *semble*, the directors cannot postpone it. *Smith v. Partridge Mines*, (1906) 2 Ch. 198. I

1.—“Extraordinary general meeting”—(Concluded).

(2) Defect in convening meeting.

A meeting convened by a Board not properly constituted (e.g., by the exclusion of persons entitled to be present) may be so irregular that its resolutions will be ineffectual. *Harben v. Phillips*, 23 Ch. Div. 14, 34.J

The same result will ensue where the meeting is summoned by the secretary, without the authority of the directors duly assembled at a Board, *Haycraft Cold Co.*, (1900) 2 Ch. 230; or without any authority from any directors. *State Wyoming Syndicate*, (1901) 2 Ch. 431. K

(3) Interference by Court.

(a) Upon the principle that the Court will not interfere with internal management, the Court will not direct a meeting for general purposes where the directors or the requisite number of share-holders do not think proper to summon one. *MacDougall v. Gardiner*, 10 Ch. 606. L

(b) It is elementary that the Court will not interfere with internal management, and in fact has no jurisdiction to do so. *Burland v. Earle*, (1902), A.C. 93. M

(c) If a meeting cannot be otherwise summoned at all, or if the object is a special one, such as to ascertain whether legal proceedings instituted by shareholders in the name or on behalf of the Company have the approval of the company, (See *Atwood v. Merryweather*, 5 Eq. 464 n). The Court might call a meeting (*Quære whether, except in a winding-up the Court has any power to call a meeting*; *Mason v. Harris*, 11 Ch. Div. 97, 109); or give an opportunity for a meeting to be called. See Buckley on Companies (Consolidation) Act, 1908, 605. N

(d) The Court may control the directors as to the date at which a meeting shall be summoned if they are exercising their discretion improperly, e.g., are calling the meeting earlier than usual in order to exclude from voting the transferees of shareholders who have recently executed transfers with a view to increasing their voting power. *Cannon v. Tyash*, 20 Eq. 669. O

(e) It must be a very strong case indeed which will justify the Court in restraining a meeting of shareholders. *Isle of Wight Railway Co. v. Tahourdin*, 25 Ch. Div. 320. P

(33) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

(34) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

Proceedings at General Meeting.

(35) Seven days' ¹ notice ² at the least, specifying the place, the day, and the hour of meeting, and in case of special business the

general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(Notes).

(1) Corresponding English law.

Seven days' notice at the least (*exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which the notice is given*) specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but the non-receipt of the notice by any member shall not invalidate the proceedings at any general meeting. [Art. 49, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.]

Q

(2) Scope and applicability of this article.

This article does not apply to meetings of the subscribers of the memorandum: only reasonable notice of such meetings is necessary. *John Morley Building v. Barras*, (1891) 2 Ch. 386.

R

1.—“Seven days.”

Seven days.

The days must, it is conceived, be days calculated from midnight to midnight. *Mercantile Investment Co. v. International Co. of Mexico*, (1893) 1 Ch. 484-n at 489-n.

S

2.—“Notice....the general nature of such business.”

(1) Notice of business to be transacted.

(a) When a meeting is called for business, of which notice is necessary, the notice must give substantial information as to that which is proposed to be done; resolutions passed upon insufficient notice may be invalid. *Garden Gully Co. v. McLister*, 1 A.C. 39.

T

(b) Where a notice of a meeting to receive the directors' report and to elect directors was accompanied by a report which stated “Directors:—You will be asked to ratify the election of A.”, held that this was sufficient notice of that business. *Boschoek v. Fuke*, (1906) 1 Ch. 148.

U

(2) Notice of meeting for special business—Extraordinary meeting.

Notice of a meeting summoned “on special business” is not sufficient notice for an extraordinary meeting. *Wills v. Murray*, 4 Ex. 843.

V

(3) Notice, sufficiency of.

It may be impossible adequately to convey the “general” nature of the business without going into detail. *Young v. South African Syndicate*, (1896) 2 Ch. 268, where the question of what is sufficient notice was discussed.

W

2.—“Notice....the general nature of such business”—(Concluded).

(4) Notice—Want of observance of formalities.

When the shareholders have in substance had notice, the want of observance of formalities in respect of the manner of giving notice will not necessarily render the proceedings at the meeting invalid. At any rate, a member who was present at the meeting cannot question its regularity. *British Sugar Refining Co.*, 3 K. & J. 408. **X**

(5) Notice when deemed to be served.

(a) The notice is deemed to be served on the day on which the letter would be delivered in the ordinary course of post. *Gore-Browne and Jordan on Joint Stock Companies*, 30th Ed., p. 523. **Y**

(b) In many cases this will add two days to the time required. The day of service is not to be counted in reckoning the seven days' notice, but the day of meeting may be counted. (*Ibid.*) **Z**

(36) All business¹ shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, and the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

(Notes).

Corresponding English Law.

This article is exactly similar to the first portion of Art. 50, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. In the English enactment in continuation of what is stated in this article we find the following “—and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.” **A**

1.—“Business.”

Notice—Business to be transacted.

The business of which notice must be given is everything not referred to in the exceptions above, including all business done at extraordinary meetings. The business referred to in the exceptions may be transacted although not mentioned in the notice convening the meeting. *Gore-Browne and Jordan on Joint Stock Companies*, 30th Ed., p. 523. **B**

(37) No business shall be transacted at any general meeting, except the declaration of a dividend, unless a quorum of members¹ is present at the time when the meeting proceeds to business. Such quorum shall be ascertained as follows, that is to say: If the persons who have taken shares in the Company at the time of the meeting do not exceed ten in number, the quorum shall be five, if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation that no quorum shall in any case exceed twenty.

(Notes).

Corresponding English Law.

No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided three members personally present shall be a quorum. [Art. 51, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] G

1.—“*Quorum of members.*”

Members—Qualification.

Whether under this article the members to form the quorum must be members entitled to vote, *quaere*. *Young v. South African Syndicate*, (1896) 2 Ch. 268 (277). D

(38) If, within one hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week, at the same time and place; and if, at such adjourned meeting, a quorum is not present, it shall be adjourned *sine die*.

(Notes).

(1) Corresponding English Law.

If within *half an hour* from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum. [Art. 52, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] E

N.B.—For “one hour” in this article, we have “half an hour” in the English Enactment. While this article states that “if at the adjourned meeting a quorum is not present, it shall be adjourned *sine die*,” in the English Act it is stated that “the members present at the adjourned meeting shall be a quorum.”

(2) Resolution when invalid.

(a) A resolution passed at a meeting at which a proper number of persons is not present is altogether invalid. *Howbeach Coal Co. v. Teague*, 5 H. & N. 151. F

(b) So also one passed at a meeting improperly convened. *Harben v. Phillips*, 23 Ch. Div. 14 (34.) G

(39) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the Company.

(Notes).

Corresponding English Law.

This article is word for word the same as Art. 53, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. H

(40) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.

(Note).

Corresponding English Law.

This article is almost exactly similar to Art. 54, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. In the English enactment, the following phrase, "or is unwilling to act" is added after the word "meeting".

(41) The chairman may, with the consent of the meeting, adjourn any meeting¹ from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(Notes).

Corresponding English Law.

The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting. [Art. 55, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.]

1.—"The Chairman....adjourn any meeting."

Meeting—Adjournment to be made by whom.

- (a) There is at common law a right of adjournment of a public meeting. *Reg. v. D'Oyly*, 4 Perry and Davison 52; but see *Salisbury Gold Co. v. Hathorn*, (1897), A.C. 268, 275, *infra*. K
Semble, if lies in the chairman. (*Ibid.*)
- (b) But this must be for the proper conduct of the business, not for its frustration. A chairman has no power to stop a meeting at his own will and pleasure; the meeting by itself can resolve to go on with the business for which it has been convened, and appoint another chairman. *National Dwellings v. Sykes*, 1894, 3 Ch. 159. L
- (c) The chairman has no power to stop or adjourn a meeting without its consent. *National Dwellings Society v. Sykes*, (1894) 3 Ch. 159. M
- (d) This clause requires the chairman to adjourn if so directed by the meeting. *Gore-Brown and Jordan on Joint-Stock Companies*, 30th Ed., p. 524. N
- (e) In the absence of special provision (which there is here) a chairman is not bound to adjourn a meeting, though a majority of members present wish him to do so; he cannot adjourn it of his own mere motion. *Salisbury Gold Co. v. Hathorn*, 1897, A.C. 268. O

1.—“*The Chairman . . . adjourn any meeting*”—(Concluded).

(f) *Semble*.—The directors cannot postpone a meeting after it has been convened. *Smith v. Paranga Mines*, (1906), 2 Ch. 193. P

(g) A majority cannot refuse the minority a hearing; but after the minority has had a fair hearing the chairman may, with the sanction of a vote of the meeting, close the discussion and put the question to the vote. *Wall v. London and Northern Corp.*, (1898), 2 Ch. 469. Q

(42) At any general meeting, unless a poll¹ is demanded by at least five members, a declaration by the chairman that a resolution has been carried,* and an entry to that effect in the book of proceedings² of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(Notes).

Corresponding English Law.

At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution. [Art. 56, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] R

N.B.—In the English enactment reference is made to “show of hands”. That is not to be found in this article. According to the English Law for a poll, there should be a demand at least by 3 members; but under this article the demand should be from at least 5 members.

1.—“*Poll*.”

Poll when to be demanded.

The demand for a poll must be “before or on the declaration of the result of the show of hands.” It seems that a demand for a poll after the meeting has proceeded to other business would be too late. Any attempt to prevent a poll by passing rapidly to other business would fail. *Gore-Browne & Jordan on Joint-Stock Companies*, 30th Ed., p. 524. S

2.—“*Declaration . . . book of proceedings*.”

Poll—Demand—Chairman's declaration of the result—Entry in book of proceedings—Effect.

(a) If the articles specify that five or less persons may demand a poll, these provisions of the Articles will prevail, and a poll may be demanded by the number specified in the articles, but not by fewer persons, and, unless the poll is demanded by the proper number of persons, the chairman's declaration of the result of the voting on the special or extraordinary resolution will be conclusive. *Gore-Browne & William Jordan on Joint-Stock Companies*, 30th Ed., p. 261. T

2.—“Declaration....book of proceedings” —(Concluded).

- (b) Table A, Art. 42, extends this effect of the Chairman's declaration, if accompanied by an entry in the minute book, to other resolutions. *(Ibid.)* U
- (c) This will prevent the question being re-opened in legal proceedings, even if evidence is tendered that the chairman's declaration was wrong. (*Arnot v. United African Lands*, (1901) 1 Ch. 518, C.A.) unless an error appears on the face of the declaration of the chairman, e.g., where he states the number of votes given and they are in sufficient. *Caratal (New) Mines, Limited*, (1902) 2 Ch. 408. V
- (d) Where the Articles of Association declared that if votes were not disallowed at the meeting they should be good for all purposes, it was held that, in the absence of fraud or bad faith, the resolution could not be impeached on the ground that votes were improperly received. *Wall v. London and Northern Assets Corporation* No. 2, (1889) Ch. 550. W

(43) If a poll is demanded by five or more members¹, it shall be taken in such manner as the chairman directs², and the result of such poll shall be deemed to be the resolution³ of the Company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

(Notes).

This article is almost exactly similar to Arts. 57, 58, Table A, Sch. I, the English Companies (Consolidation) Act, 1908. X

1.—“Poll is demanded....members.”

(1) Poll—Demand to be made by whom.

- (a) It is an attribute at common law of all public meetings that any qualified person may demand a poll. *Reg. v. Wimbledon Local Board*, 8 Q.B. Div. 459. Y
- (b) *Quære*, whether a demand for a poll which has been acceded to can be withdrawn after the close of the meeting. *Rea v. Dover*, 1903 1 K.B. 668. Z

(2) Poll, Power of demanding, Exercisable by whom—Proxy.

- (a) Where the power of demanding a poll was by the articles given to shareholders qualified to vote and holding so many shares, the power was exercisable only by share-holders present in person, for the holder of proxies is not the holder of the shares included in the proxy. *Reg. v. Government Stock Investment*, 8 Q.B.D. 442. A
- (b) Both the demand for a poll and the method of taking it must of course be in accordance with the provisions of the Articles. *Haven Gold Mining Co.*, (1882) 20 Ch. D. 151. B
- (c) The chairman must decide whether a poll is properly demanded, having regard to the Articles, which sometimes impose a limit of time for the demand, and require that a certain proportion of the Capital of the Company, shall be represented as well as a certain number of shares. Gore-Brown and Jordan, on Joint-Stock Companies (30th Ed.), p.260. C
- (d) A proxy authorizing a person to vote does not authorize him to demand a poll. *Haven Gold Mining Co.*, 20 Ch. D. 151, 157. D

2.—“It shall be taken....directs.”

(1) “Poll, demand of—Chairman's duties and rights.

- (a) The Chairman has generally, also, to determine how the poll is to be taken. Gore-Brown and Jordan on Joint-Stock Companies, 30th. Ed., p. 260. E
- (b) It has been said that if a poll is demanded, the chairman cannot direct it to be taken then and there, but that an opportunity ought to be given for the members who are not present to vote at the poll. *Horbury Bridge Co.*, 11 Ch. Div. 109. F
- (c) There is, however, authority to the contrary in *Reg. v. D'Oyly*, 12 Ad & El 139. G
- (d) Kay, J., held that under an article providing that the poll shall be taken “in such manner as the chairman shall direct,” the poll may be taken then and there. *Chillington Iron Co.*, 29 Ch. D. 159. H
- (e) *Secus*, if the articles require that the poll be taken subsequently, *British Flax Co.*, 1889, W.N. 7. I
- (f) If there is a question of much importance to be decided, he may fix a future day, and notice should be given to all the share-holders of the appointed place and time. If the matter is not of great importance, or if there is a representative gathering of share-holders present, the poll may be taken at once. *Chillington Iron Co.*, (1886) 29 Ch. D. 159. J
- (g) In any case the votes should be taken in writing, and an entry made of how many votes each share-holder is entitled to give and actually does give. Each share-holder should sign his name as a guarantee that there is no personation. The chairman must declare the result of the poll, but it is most desirable that there should be scrutineers present on each side at the counting. Proxies may be used in the poll, if allowed by the regulations of the company. If there are several resolutions, the poll must be taken on each separately. If it be taken on a number of resolutions together, they cannot be validly passed. *Patent Wood Keg Syndicate v. Pearse*, (1906) W.N. 164. K

(2) Poll—Article contemplating voting in person.

If the Articles contemplate voting in person the chairman cannot direct that the poll be taken by the voting papers. *McMillan v. Le Roi*, 1906, 1 Ch. 331. L

(3) Poll, no demand of—Voting by numerical majority.

By English common law, votes at all meetings are taken by show of hands, and it is only when a poll is taken that regard is to be had to voting power according to number of shares. Unless a poll is demanded, the voting will go by numerical majority. *Horbury Bridge Co.*, 11 Ch. D. 151, 157. M

(4) Company—Meeting of share-holders—Power of chairman—Poll—Time for taking a poll—Right of share-holder to vote at meeting—Construction.

- (a) At common law and where the taking of a poll is not governed by statute or special rule, the chairman of a meeting is the proper authority to fix the time and place for the taking of a poll; and a poll is properly and correctly taken immediately after the termination of the meeting. 15 B. 164.

2.—“It shall be taken....directs” —(Concluded).

- (b) The same rules apply to meetings of registered companies unless their Articles prescribe some other procedure. (*Ibid.*) O
- (c) The object of a poll in the case of a meeting of members of a registered company, as of other meetings, is to ascertain the true sense of the meeting, and is not to give absent members a further opportunity of voting, unless a contrary intention is expressly or impliedly to be gathered from the Articles of the company. (*Ibid.*) P
- (d) There is no presumption in construing a doubtful Article in the latter sense. (*Ibid.*) Q
- (e) One of the Articles of Association of a Joint Stock Company provided as follows :—“ Every share-holder not disqualified by the preceding Article or Article No. 17, and who has been duly registered for three months previous to the general meeting, shall be entitled to vote at such meeting, and shall have one vote in respect of every share held by him.”

Held, that the meaning of the above Article was merely that a share-holder should be registered for three months before he could vote, but that having thus once acquired the right to vote he had one vote in respect of every share held by him. It was not necessary under the Article that every such share should have been held by him for three months. (*Ibid.*) R

3.—“Resolution.”

(1) Resolution—Necessity—Importance.

- (a) A resolution of the proper majority of the share-holders in general meeting is the proper mode of declaring the will of the corporation, but if all the shareholders, and not a majority only, expressly assent the absence of a resolution may be immaterial. *Wenlock v. River Dee Co.*, 36 Ch. Div. 675 n, 681 n. S
- (b) As to what is an act of the corporation binding the corporation, and what constitutes a meeting of the corporation, some authorities will be found collected in *Staple of England v. Bank of England, Per Wills*, J. 21 Q.B.D. 165. T

(2) Motion, seconding of.

It is not necessary that a motion put to the meeting should be seconded, and, *semble*, a question might be put by the chairman without its being either proposed or seconded. *Horbury Bridge Co.*, 11 Ch. D. 109. U

Votes of Members.

(44) Every member shall have one vote for every share up to ten. He shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares¹.

(Notes).

Corresponding English Law.

On a show of hands every member present in person shall have one vote.

On a poll every member shall have one vote for each share of which he is the holder. [Art. 60, Table A, Sch. I. The English Companies (Consolidation) Act, 1908.] Y

N.B.—The graduated scale, diminishing the voting power of the holders of large blocks of shares contained in this Article is not to be found in Art. 60, the English Companies (Consolidation) Act, 1908.

1.—“Every member....shares.”

- (1) **Vote—Larger number of shares—Smaller number of votes—Right of shareholder to transfer shares to nominees for getting maximum voting power.**

Where under the articles (as in Art. 44, Act VI of 1882) a larger number of shares gives a relatively smaller number of votes, a share-holder may, with a view to a particular meeting, transfer his shares or some of them to nominees in such manner as to secure to himself the maximum list of voting power, and unless the directors have under the articles some power to refuse registration available against him they cannot decline to register his transfers. *Stranton Iron Co.*, 16 Eq. 559; *Pender v. Lushington*, (1877), 6 Ch. D. 70. **W**

- (2) **Director—Personal interest—Right to vote as share-holder.**

(a) Notwithstanding the fact that a director disentitled under the articles to vote as director in respect of any contract in which he is interested, he is entitled so to vote as a share-holder at a general meeting. *East Pant Du Mining Co. v. Merryweather*, 2 H. & M. 254. **X**

(b) A share-holder is entitled to vote as he pleases, and to consult his own interest, (provided his vote be bona fide, and not contrary to public policy). *Elliot v. Richardson*, L.R. 5 C. P. 744. **Y**

(c) In the absence of anything in the articles to the contrary, he is not debarred from voting upon a question in which he is personally interested. *Cf. London and Mercantile Discount Co.*, 1 Eq. 277. **Z**

(d) His vote, if not impeachable for fraud, may in fact determine the matter in his own favour by turning the scale. *North West Transportation Co. v. Beatty*, 12 A.C. 589, 598. **A**

(e) “Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the share-holders duly convened upon any question with which the company is legally competent to deal is binding upon the minority, and consequently upon the company, and every share-holder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to or different from the general or particular interests of the company.” (*Ibid.*) **B**

(f) Where the question was whether or not the company should adopt a bill which had been filed to impeach the title of some of the share-holders, the holders of those shares were entitled to vote. To have decided otherwise would have been to prejudge the question at issue. *East Pant Du Mining Co. v. Merryweather*, 2 H. & M. 254. **C**

(g) Where the question was whether the Company should purchase a steamer belonging to one member, the resolution to do so was binding although that member's own vote turned the scale. *North West Transportation Co. v. Beatty*, 12 A.C. 589. **D**

(h) The share-holder's vote is a right of property, and he is entitled if he pleases to exercise it in a manner adverse to what others may think the interest of the company, and from motives of his own individual interest. *Pender v. Lushington*, 6 Ch. D. 70. **E**

I.—“Every member....shares”—(Concluded).

- (i) He may for valuable consideration bind himself as to the manner in which he will in the future give his vote. *Greenwell v. Porter*, 1902, 1 Ch. 580. F

(3) Right of minority to sue—Use of company's name—Rules.

In cases where a minority are being overborne by the vote of a majority, or where some member or members are desirous of litigating some question connected with the company, and it is an open question whether they form a majority of the company or not, a question often arises as to the right to sue, and in case there be a right to sue, then as to the proper form of action. The following rules summarised by Buckley in his work on the Companies (Consolidation) Act, 1908, pp. 612—614 may with advantage be cited here. G

Rules.

- I. (a) If an act, not *ultra vires* the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain. *Foss v. Harbottle*, 2 Hare 461; *Burland v. Earle*, 1902, A.C. 93. H
- (b) The Court will not entertain the complaint except at the instance of the majority, and in a proceeding in which the corporation is plaintiff. *Mozley v. Alston*, 1 Ph. 790. I
- II. (a) In any proceeding brought to redress a wrong done to the corporation or to recover property of the corporation, or to enforce rights of the corporation, the corporation is the only proper plaintiff. *Gray v. Lewis*, 8 Ch. 1035, 1050. J
- (b) Except that if (see rule III, *infra*) an individual corporator sues the corporation to prevent it from doing something *ultra vires*, e.g., to restrain it from carrying out an agreement with a third party, and joins that third party as a defendant, then as a necessary incident to the first part of the relief claimed, the Court will go on to direct the repayment of money, or restoration of property paid or disposed of under the agreement. *Russell v. Wakefield Waterworks Co.*, 20 Eq. 481. K
- III (a) A single share-holder suing on behalf of himself and others (as to joining such a cause of action with a purely personal claim, see *Strand v. Lawson*, 1898, 2 Q.B. 44.), or suing alone and not on behalf, (*Simpson v. Westminster Palace Hotel Co.*, 8 H.L.C. 712), may make the company a defendant, and may restrain the company and directors from doing an act which is illegal (see *Natusch v. Irving*, Gow on Partnership, App. 398;), or criminal (*Powell v. Kempton Park*, 1897, 2 Q.B. 242, 260, 268;) or *ultra vires* the corporation, and which a majority are consequently unable to affirm. *E.G. Holmes v. Newcastle Abattoirs Co.*, 1 Ch. D. 682. L
- (b) A stranger who is not specially damaged cannot sue, *Ware v. Regent's Canal Co.*, 3 De G & J. 228. M
- (c) Neither *semble* a share-holder, who has with knowledge received and retains part of the proceeds of the *ultra vires* act. *Towers v. African Trug Co.*, (1904), 1 Ch. 558. N

Rules—(Continued).

- (d) If, however, a majority are opposed to the illegal act, *quære* whether the company should not be made or at any rate joined as plaintiff.
- IV. If the act complained of be not *ultra vires*, but be a wrong done to the corporation, of which therefore the Corporation alone on the principles already stated can complain, yet if the alleged wrong-doers be themselves the majority, or turn the scale of the majority, then the minority may sue by one share-holder on behalf of himself and others, *Atwood v. Merryweather*, 5 Eq. 464 (n). O
- V. (a) The above are general rules strictly adhered to, but not inflexible, and any case in which the claims of justice require that an action in which the company is not plaintiff should be entertained, may be made an exception. See *Per* Jessel, M.R., in *Russell v. Wakefield Water works Co.*, 20 Eq. 482. P
- (b) But if the case is one in which the company ought to sue then (subject to rule VI) the share-holder must exhaust all reasonable means of obtaining the institution of an action by the company before suing himself. *Morris v. Morris*, 1877, W.N. 6. Q
- (c) But if the case be one of class (IV), it is idle to say that a meeting ought to be called in which the alleged wrong-doers should not vote, for that would be trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried. *Mason v. Harris*, 11 Ch. 97. R
- VI. (a) If the case be one in which the company ought to be plaintiff, the fact that the seal is in the possession of the adverse party will not necessarily preclude the intending plaintiffs from using the company's name. Neither will it be necessary to obtain the resolution of a general meeting in favour of the action before the writ is issued. In many cases the delay might amount to a denial of justice. In a case of urgency, the intending plaintiffs may use the company's name, but at their peril, and subject to their being able to shew that a meeting be called at the earliest possible date to determine whether the action really has the support of the majority or not. *Exeter and Crediton Railway Co., v. Buller*, 5 Railw. cas. 211. S
- (b) If it appears that the company's name has been used improperly, it will be struck out. *Silber Light Co. v. Silber*, 12 Ch. D. 717. T
- (c) And either the solicitor who used it, (*Newbiggin Gas v. Armstrong*, 18 Ch. Div. 310,) or the person who in fact instructed the solicitor, (*La Compagnie de Mayville v. Whitley*, 1896, 1 Ch. 788, 804;) will, (notwithstanding a previous discontinuance, *Gold Reefs v. Dawson*, 1897, 1 Ch. 788, 804;), be ordered to pay the company's costs as between solicitor and client and the defendant's costs as between party and party. U
- VII. (a) A single share-holder may sue the company to enforce any individual right of his own, e.g., his right to have his vote recorded. *Pender v. Lushington*, 6 Ch. D. 70, 81. V
- (b) or his right as a director to restrain his co-directors from excluding him from the board. *Pulbrook v. Richmond Co.*, 9 Ch. D. 610. W

Rules—(Concluded).

(4) Right to sue—Use of Company's name—Company in liquidation.

When the company is in liquidation, the only persons to whom the Court has any jurisdiction to give leave to use the company's name are the creditors and contributories. The principle on which leave to use the company's name is given is the same as that on which a *cestui que trust* could formerly file a bill against his trustee to be allowed to use his name to recover trust property. Where upon an application in the winding-up, an order had been made directing payment of the applicant's costs out of the assets, a subsequent order allowing the applicant's solicitors (who were of course entitled to the costs) to use the name of the company to institute proceedings against directors for misfeasance was discharged on appeal as made without jurisdiction. *Cape Breton Co v. Fenn*, 17 Ch. Div. 198. X

(5) Non-voting shares.

It is not uncommon to provide that certain shares, frequently preference shares, shall have no vote. Such provisions are legal. The non-voting shares have no ground of complaint even as regards resolution passed by the ordinary share-holders and affecting the preference share-holders, unless such resolutions are at variance with the rights of the preference share-holders. *Barrow Steel Co.*, 39 Ch. D. 582, 603. Y

(45) If any member is a lunatic or idiot, he may vote by his committee or other legal curator; and, if any member is a minor, he may vote by his guardian or any one of his guardians if more than one.

*(Note).***Corresponding English Law.**

A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee, *curator bonis*, or other person in the nature of a committee or *curator bonis* appointed by that Court, and any such committee, *curator bonis*, or other person may on a poll, vote by proxy. [Art. 62, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] Z

(46) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

*(Note).***Corresponding English Law.**

In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members. [Art. 61, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] A

(47) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer, at any meeting held after the expiration of three months from the registration of the Company, unless he has been possessed of the share in respect of which he claims to vote for at least three months¹ previously to the time of holding the meeting at which he proposes to vote.

(Notes).

Corresponding English Law.

No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid. [Art. 63, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] B

1.—“No member...three months.”

Company—Meeting of share-holders—Powers of Chairman—Right of share-holder to vote at meeting—Construction.

One of the Articles of Association of a Joint-Stock company provided as follows : —“Every share-holder not disqualified by the preceding Article or Article 17, and who has been duly registered for three months previous to the general meeting, shall be entitled to vote at such meeting, and shall have one in respect of every share held by him.” *Held* that the meaning of the above Article was merely that a share-holder should be registered for three months before he could vote, but that having thus once acquired the right to vote he had one vote in respect of every share held by him. It was not necessary under the Article that every such share should have been held by him for three months. 15 B. 164. C

(48) Votes may be given either personally or by proxy¹.

(Notes).

Corresponding English Law.

This is taken word for word from Art. 64, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. D

1.—“Proxy.”

Proxy for absent member—Voting—Show of hands.

A proxy for an absent member has no right to vote on a show of hands. *Ernest v. Loma Mines*, 1896, 2 Ch. 572; [Bidwell Bros., 1893, 1 Ch. 603, *overruled*.] E

(49) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or, if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the Company¹.

(Notes).

Corresponding English Law.

The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or, if the appointor is a corporation, either under the common seal, or under the hand of an officer or attorney so authorised. No person shall act as a proxy unless either he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy, or he has been appointed to act at that meeting as proxy for a corporation. [Art. 65, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] F

I.—“No person....proxy....company.”

(1) Proxy to be share-holder—Proxy becoming share-holder at meeting time.

Under Articles which provided that “no person shall be appointed or have authority to act as a proxy who is not a share-holder,” a proxy in favour of a person who was not a share-holder when it was signed but was a share-holder at the date of the meeting was valid. *Bombay Corp. v. Dorabji*, 1905, A.C. 213. G

(2) Proxies—Qualifications of proxy—Construction.

One of the Articles of Association of a limited company was: “No person shall be appointed or have authority to act as a proxy who is not a share-holder in the company”—*Held*, that to construe this Article as requiring the person appointed to be a share-holder when the proxy is signed, is to put too narrow a construction on the words. If an unqualified person is named in the proxy the nomination is not an appointment in any effective sense; his nomination does not become an appointment until he is qualified. In order to act something more is required, he must be qualified not only when appointed but when he acts. 29 B. 126=7 Bom. L.R. 99. H

An Article of Association of a limited company ran: “No person shall be allowed to vote or act as a proxy at any meeting unless the instrument appointing him shall have been deposited at the registered office of the company not less than 48 hours before the time for holding the meeting at which the person named in such instrument proposes to vote” (Art. 66). A share-holder in the above company executed, in 1881, a proxy which was in fact a power of attorney not only to vote at meetings but to act generally for the share-holder signing it in all matters connected with the Company and any other Company taking over its business. The proxy authorised and appointed certain specified persons “and all persons who at any time during the continuance of this power of attorney may be partners in the firm of Wallace and Company of Bombay, however that firm may be at any time constituted.....and in the absence from Bombay of all the said persons then the persons or person for the time holding the procuration of the said firm and managing the said business jointly and each of them severally.....to be my proxy to vote for me and on my behalf at any meeting or meetings of the said managing partner of the firm of Wallace & Co. and a share-holder in the corporation: but he was neither a member of the firm nor a share-holder in the corporation when the proxy was signed. Before the meeting his name was entered as usual in a register of proxies kept by the corporation as the

1.—“No person . . . proxy . . . company”—(Concluded).

person who would use the proxies at those meetings. An objection to the proxy was that M was not named in it:—*Held*, that although not named in the proxy in the strict literal sense of the word “named” (Art. 66), he was sufficiently described in the proxy for all business purposes. (*Ibid.*) I

(3) Proxy—Act XII of 1895—Articles of Association—Right to vote.

One of the Articles of Association of a Joint-stock Company was: “No person shall be appointed or have authority to act as a proxy who is not a share-holder in the company.” *Held* that the qualification prescribed by the article must exist both at the time when the appointment was made and also at the time when the authority to act under it was exercised. 27 B. 113=4 Bom. L.R. 958. J

Per Jenkins, C.J.—The requisitions of the Article appear to contemplate the appointment of no one but ascertained individuals holding the prescribed qualification at the date of the instrument, and not an appointment whereby a number of persons, some ascertained and some not, some at the time qualified and some not, are vested with authority to vote, without any exhaustive attempt as to the time except the continuance of a particular firm, however, that firm may at any time be constituted. K

(50) The instrument appointing a proxy shall be deposited at the registered office of the Company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

(Notes).

(1) Corresponding English Law.

The instrument appointing a proxy and the power of attorney, other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than *forty-eight hours* before the time for holding the meeting at which the person named in the instrument proposes to vote and in default the instrument of proxy shall not be treated as valid. [Art. 66, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] L

N.B.—For forty-eight hours, we have in Art. 50, Act VI of 1882, 72 hours.

(2) Scope of this Article.

This Article provides for the previous lodgment of the proxy paper. In the absence of such a provision it would seem that the vote of the proxy ought to be accepted, although he is not prepared at the meeting to prove his authority by then and there producing the proxy paper. See *English Scottish and Australian Bk.*, 1893, 3 Ch. 385, 418, where details will be found of an elaborate scheme for enabling persons abroad to vote at meetings in England for the purpose of a scheme of arrangement. M

(51) Any instrument appointing a proxy¹ shall be in the following form:—

Company, Limited.

I, _____, of _____, being a member of the _____ Company, Limited, and entitled to _____ vote or _____ votes, hereby appoint _____, of _____, as my proxy, to vote for me and on my behalf at the (ordinary or extraordinary, as the case may be) general meeting of the Company to be held on the _____ day of _____, and at any adjournment thereof (or at any meeting of the Company that may be held in the year _____). As witness my hand, this _____ day of _____. Signed by the said _____ in the presence of _____.

(Notes).

Corresponding English Law.

An instrument appointing a proxy may be in the following form or in any other form which the directors shall approve:—

Company Limited.

"I _____ of _____ in the country of _____ being a member of the _____ Company, Limited, hereby appoint of _____ as my proxy to vote for me and on my behalf at the (ordinary or extraordinary, as the case may be) general meeting of the company to be held on the _____ day of and at any adjournment thereof."

Signed this _____ day of _____.

[Art. 67, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] N

N.B.—This form differs from the form in Art. 51, Act. VI of 1882. This form does not require a witness to attest signature.

1.—"Proxy."

(1) Proxy unattested.

Where the articles require that a proxy shall be attested, an unattested proxy must be rejected. *Harben v. Phillips*, 23 Ch. Div. 14, 22, 31, 35. **O**

(2) Proxies, stamps and postage on—Practice in England.

- (a) If some question of importance, e.g., a question of policy affecting the conduct of the business, is to be placed before a meeting of the corporation, it is not only legitimate, but is expressly the duty of the directors to take such steps as are necessary to secure the best expression of the corporate voice, and to lay before the corporators, and even press them to support, the policy which the directors acting *bona fide* in the interest of the company hold to be right. The expense of so doing may be met with from the complete funds. It cannot be *ultra vires* to use the company's funds *bona fide* and reasonably to obtain the best expression of the voice of the company in general meeting on question of corporate interest. Under such circumstances, the expense of the issue of a circular and of printing and issuing stamped proxies and paying postage and return postage—

1.—“Proxy”—(Concluded).

may, if reasonably necessary, be met with from the funds of the company. *Peel v. L. & N.W.R.* 1907, 1 Ch. 5 (*Studdart v. Grosvenor*, 33 Ch. D. 528, overruled). P

(b) But if the meeting be one not in the interests of the corporation but of the directors personally the principle does not apply. *English Scottish and Australian Bk.* 1898, 3 Ch. 335, 419. Q

(3) Proxy Corporation giving.

A corporation may give a proxy, *Indian Zoedon Co.*, 26 Ch. Div. 70, 78, Art. 43, *supra* makes express provision for it. R

(4) Proxy in blank—English practice.

In England, it is conceived, that a proxy paper signed by X with the name of the proxy in blank, and handed by him to Y, may be filled up by Y, and when so filled up will be valid. *E. P. Lancaster*, 5 Ch. Div. 911. S

(5) Proxy, liquidator's, in bankruptcy.

A proxy signed by the liquidator in his own name, not describing himself as an agent duly authorised by the company, is valid in bankruptcy as a proxy for the company in liquidation. *E. P. Taylor*, 1877, W.N. 136. T

(6) Proxy—Stamp duty.

Description of Instrument.	Proper Stamp duty.
Proxy empowering any person to vote at any one election of the members of a district or local board or of a body of municipal commissioners, or at any one meeting of (a) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and transferable, (b) a local authority or (c) proprietors, members or contributors to the Fund of any institution.	One anna.

[Art. 52, Stamp Act, II of 1899.]

U

Directors.

(52) The number of the directors¹, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(Notes).

Corresponding English Law.

This is taken word for word from Art. 68, Table A, Sch. I of the Companies (Consolidation) Act, 1908. But in the English Law, it is stated that the number of the directors and the names of the first directors, etc., shall be determined *in writing* by a *majority* of the subscribers of the memorandum of association. Art. 52 of the Indian Act does not contain the words “*in writing*” or the word “*majority*.” Y

I.—“Directors.”

(1) Director—Sole director—Limited Company.

A company need not have any directors or may have a sole director or sole manager. A limited company may be director or manager of another limited company. *Bulawayo Co.*, 1907, 2 Ch. 458. W

(2) *Ibid.*—Subscribers' power to appoint.

The power of subscribers to appoint remains in force until an appointment of directors has been made notwithstanding that the first general meeting has been held. See *John Morley Building Co. v. Barras*, 1891, 2 Ch. 386. X

(3) Directors appointed by name.

It is not uncommon for the directors to be appointed by name in the Articles. See Buckley on the Companies (Consolidation) Act, 1908, 9th Ed., p. 618. Y

(4) Director—Qualification.

If the provision in the Articles be that no person shall be “eligible” as a director unless he holds or that the “future qualification” of a director shall be, so many shares, directors named in the memorandum or articles are not within the qualification of shares. *Stock's case*, 4 D. J. & S. 426; *Lord Cloud Hamilton's case*, 9 Ch. 548. Z

(5) Directors, powers of first.

The first directors have the powers of directors for all purposes, their powers are the same as those of the directors to be elected by the share-holders. They may appoint one of their number to the office of manager at a salary, subject, of course, to the consequence that the person so appointed vacates his office of director. *Eales v. Cumberland, Black Lead Mine Co.*, 6 H. & N. 481. A

See, also, notes under Art. 53, *infra*.

(53) Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors ¹.

(Notes).

I.—“Until....directors.”

Directors, powers of first.

(a) *Semble*.—Acts done by the subscribers acting as first directors, unanimously, held not to be vitiated by the fact of no meeting being held to sanction them. *Hollows v. Fernie*, 3 Eq. 520 (537). B

(b) But, where at a meeting at which three only of seven subscribers were present, five of the subscribers were appointed directors, and a call was afterwards made at a meeting at which three only of the persons so chosen directors were present, the call was held to be invalid, and not capable of being enforced against a subscriber who had attended meetings as one of the directors; for the appointment of the directors was invalid, and the three persons who made the call were not a quorum of the subscribers in this capacity of first directors. See *Howbeach Coal Co. v. Peague*, 5 H. & N. 151; doubted in *York Tramways Co. v. Willows*, 3 Q.B. Div. 685. C

(54) The future remuneration of the directors, and their remuneration for services¹ performed previously to the first general meeting, shall be determined by the Company in general meeting.

(Notes).

Corresponding English Law.

The remuneration of the directors shall from time to time be determined by the company in general meeting. [Art. 69, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] D

1.—“Remuneration of directors....services.”

(1) Directors not servants but managers.

Directors are in the position, not of servants, but of managers of the company. E

N.B.—But a director also employed as a servant may be convicted of embezzlement as a servant. See *R. v. Stuart*, 1894, 1 Q.B. 310.

(2) Directors claim to services according to value.

Apart from contract or agreement, they cannot claim remuneration for their services according to their value. *Dunston v. Imperial Gas Light Co.*, 3 B. & Ad. 125. F

(3) Directors—Remuneration when gratuity.

In the absence of special provision for the payment of directors, any remuneration given them is in the nature of a gratuity. *Hutton v. West Cork Railway Co.*, 23 Ch. Div. 654. G

(4) Ibid.—Gratuity to late officials, when allowable and when not.

A majority of share-holders cannot adversely to a minority vote a gratuity to their late officials when the business of the company is at an end. *Hutton v. West Cork Railway Co.*, 23 Ch. Div. 654. H

But if the business is a continuing one, so that a gratuity may be an incentive to more diligent service in the future, the company or the directors on its behalf, may give extra remuneration for part service. *Prices Candle Co.*, 24 W.R. 754. I

(5) Directors' competency to vote for remuneration to themselves.

It is not competent to directors to vote themselves remuneration unless authorised to do so by the instrument regulating the company or by the share-holders at a properly convened meeting. *Geo Newman & Co.*, 1895, 1 Ch. 686. J

(6) Directors, presents to, out of assets divisible among share-holders, but not out of capital.

It is competent to share-holders to make presents out of assets properly divisible among the share-holders themselves, but not out of capital, even though all the share-holders consent. *Geo Newman & Co.*, 1895, 1 Ch. 674 (686). K

(7) Directors—Remuneration—Income-tax.

Directors, of course, cannot take their remuneration free of income-tax and pay the tax out of the company's assets. The income-tax on directors' remuneration must be deducted from their fees and not paid out of the company's assets. *Boschoek Proprietary Co. v. Fuks*, (1906), 1 Ch. 148. L

1.—“Remuneration of directors....services” —(Concluded).

(8) Directors, payment of, fees—General presumption.

There is no general presumption that directors' fees are to be paid out of profits only. *Re Lundy Granite Co., Harvey Lewis case*, 26 L.T. 678. M

(9) Director whether entitled to expense of travelling.

A director is not entitled to his expenses of travelling to attend Board meetings. The expense of going there is covered by the remuneration. Their travelling expenses must not be paid by the company unless the articles specially so provide. *Mnung v. Naval Military and Civil Service Co-operation Society of South Africa*, (4905) 1 K.S. 687. N

(10) Director's remuneration is not a profit derived from his qualification shares.

A———If he be a trustee of those shares, his *cestui que trust* is not entitled to his director's remuneration. *Dover Coalfield*, (1907), 2 Ch. 76. O

(11) Director vacating his office by being interested in a contract with the Company.

A———is not entitled to a *quantum meruit* for his services, and if his remuneration has been paid the company may recover it. *Bodega Co.*, (1904), 1 Ch. 276. P

(12) Directors, remuneration is to be paid at such time as the, determine.

If———it is a condition precedent to recovering the amount that the directors shall have determined a time for payment. *Caridad Copper v. Swallow*, (1902), 2 K.B. 44. Q

(13) Director's resolution that no remuneration be paid for a certain year—Director taking part in it.

Where a director takes part in a director's resolution during the currency of a year, determining that no directors' remuneration be paid for that year, he cannot claim any remuneration for that year. *McConnell's claim*, (1901), 1 Ch. 729. R

(14) Director's uselessness of a services.

The———is no bar to the claim for remuneration. *Central De Knap Mines*, (1899), W.N. 216; *Shaws, Briant and Co.*, 1901, W.N. 124. S

Powers of Directors.

(55) The business of the Company shall be managed by the directors¹, who may pay all expenses incurred in getting up and registering the Company, and may exercise all such powers of the Company as are not, by the foregoing Act, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

(Notes).

[N.B.—See, also, notes under S. 214, *supra*.]

(1) Corresponding English Law.

This article is almost similar to Art. 71, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. T

(2) Nature of the article—Sufficiency.

This clause is sufficient to enable the directors to carry on the business of the company. It is common in special articles to set out at great length various powers, but this is unnecessary, and more often has the effect of limiting than of extending the powers. Gore-Browne and Jordan, on Joint-Stock Companies, p. 527. U

In *Marshall's Valve Gear Co.*, (1909) 1 Ch. 267, *Neville, J.*, held that with power such as here given the company could control the discretion of the directors, distinguishing *Automatic Self-Cleansing Filter Syndicate v. Cunningham*, (1906) 2 Ch. 84, but in *Salmon v. Quin & Axtens, Limited*, (1909) 1 Ch. 311, the Court of appeal held that directors cannot be controlled under an article in this form, (*Ibid.*) Y

(3) Scope and applicability of article—Non-payment of preliminary expenses.

(a) Under the words "the business of the company the company", an action will not lie at law against the company for non-payment of the preliminary expenses. *Melhado v. Porto Allegre Railway Co.*, L.R. 9 C.P. 503. W

(b) Notwithstanding *Hereford Waggon Co.*, 2 Ch. Div. 621 there is no binding authority for the proposition that a company because it has taken the benefit of work done under a contract entered into before the formation of the company, can be made liable in Equity under that contract. *English Produce Co.*, (1906), 2 Ch. 435, (442); *Clinton's claim*, (1908) 2 Ch. 518. X

(c) The effect of the common section in a special Act that the costs, etc., of obtaining the Act shall be paid by the company is to render the company liable to those who have done work for the intended company directly, but not to those who have been employed by others. If there is any one other than the company to whom the claimant can look for payment, the section does not apply to him. *Wyats v. Metr Board of Works*, 11 C.P.C.N.S. 744. Y

I.—"The business of the Company....directors."

(1) Articles containing provisions that directors shall not have power to do certain defined acts—Resolutions empowering them.

Where the articles provide that the directors shall not have power to do certain defined acts, any resolution of the company authorising them to do such acts in future must be a special resolution altering the articles. But if the directors do such an act without authority, the company can by ordinary resolution adopt the act so that it shall become binding on the company. *Grant v. United Kingdom Switch-back Co.*, 40 Ch. Div. 135. Z

(2) Directors—Position—Agents.

(a) Directors are agents of the company but not mere agents. *Charitable Corporation v. Sutton*, 2 Atk. 400. A

1.—“ *The business of the Company . . . directors* ”—(Continued).

(b) The director, if a share-holder, is himself a member of the body of which he is agent. He manages for himself and others. *Automatic Filter v. Cunninghame*, (1906), 2 Ch. 34; *Gramophone, Firm v. Stanley*, (1908), 2 K.B. 89. **B**

(c) He is a managing partner. *Forest of Dean Coal Co.*, 10 Ch. Div. 450, 451. *Automatic Filter v. Cunninghame*, (1906) 2 Ch. 34; *Gramophone Firm v. Stanley*, 1903, 2 K.B. 89. **C**

N.B.—The analogy must not be pressed too far.

A director cannot be restrained from acting as a director of a rival company on the ground that he is in the position of a partner. *London and Mashonaland Co. v. New Mashonaland Co.*, (1891) W.N. 165. **D**

(d) The company has no person, and so it cannot act in its person; it can act only through directors. *Ferguson v. Wilson*, 3 Ch. 77, 89. **E**

(e) Directors are described sometimes as agents, sometimes as trustees, sometimes as managing partners. Each of these expression is used, not as exhaustive of their powers or responsibilities but as indicating useful points of view from which they may for the moment and for the particular purpose be considered. It is not meant that they belong to the class. *Per Bowen, L.J., Imp. Hydropathic Co. v. Hampson*, 28 Ch. Div. 12. **F**

(3) **Directors may bind the company.**

The company is not bound by acts done by the directors for objects which the Company has no powers to entertain; these are the only acts which, if done by the directors, are *ipso facto* void. But not only do the acts of the directors when done within the scope of their authority but also where the acts of the directors, however, irregular, belong to a class of acts which is authorised by the constitution of the company, the company is bound when the acts are done with strangers who act *bona fide* with the company, and when these acts are done with the share-holders of the company, then these acts are voidable only, and where there is no dishonesty, time bars the remedy. *Per Romilly M. R. Spackman v. Evans*, L.R. 3 H. L. 171 (224). **G**

(4) **Directors—General authority—Acts reasonably necessary for management.**

The general authority of directors acting as a board extends to all acts reasonably necessary for management. See *West of England Bank v. E. P. Booker*, 14 Ch. Div. 317. **H**

(5) **Directors giving gratuity to company's servants out of profits.**

Giving gratuity to company's servants out of profits in a prosperous year by directors, is within their general powers, such grant being for the advancement of the interests of the company. *Hampson v. Price's Candle Co.*, 34 L.T. 711=24 W.R. 754. **I**

(6) **Directors granting pension to the family of a deceased servant of the company.**

Similarly directors may grant pension to the family of a deceased servant of the company for it may benefit the company to treat its servants with liberality. *Henderson v. Bank of Australasia*, 40 Ch. D. 170. **J**

I.—“The business of the Company....directors ”—(Continued).

(I) UNDERTAKING OF COMPANY SOLD—GRATUITY TO SERVANTS.

Where the undertaking of the company is sold, a gratuity to the servants cannot be given even by the company in general meeting by a majority adversely to a minority. *Hutton v. West Cork Railway Co.*, 23 Ch. Div. 654; *Strond v. Royal Aquarium*, (1903), W.N. 146= 89 L.T. 243. K

(II) COMPANY'S FUNDS NOT TO BE UTILIZED FOR OBJECTS WHOLLY FOREIGN.

A majority in general meeting cannot vote the company's funds to a purpose foreign to the company's business on the mere ground that it will indirectly increase its business. See *Tomkinson v. South Eastern Railway Co.*, 85 Ch. D. 675. L

(7) Directors, power of, to cancel shares issued.

Directors have no power to cancel shares duly issued to a share-holder at his request and so reduce the capital of the company. 20 B. 655. M

(8) Directors—Acts *ultra vires* not binding on the company.

(a) If the act was *ultra vires* in one state of facts and *intra vires* in another, and the director honestly mistook the facts, there is room for holding that he is not liable. *Kingston Cotton Mill Co.*, (No. 2, 1896), 1 Ch. 831. N

(b) But, except in such a case, the law is that, if a director, acting beyond any power the company can confer on him, parts with the company's money, the fact that he acted *bona fide* and with the approval of the majority of the shareholders is no defence to an action by the company. *Buckley on Companies (Consolidation) Act*, 1908, p. 625. O

(9) Directors, acts of, *ultra vires*, rendered valid by acquiescence.

Acts of directors which are *ultra vires*, *re* their powers, may be rendered valid by acquiescence; but *semble* only by the acquiescence of every shareholder. See *Agriculturists' Cattle Insurance Co's* cases, *Eg. Spackman v. Evans*, L.R. 3 H.L. 171, etc., etc. P

(10) Directors, powers of—Acts in excess of powers—Ratification.

The plaintiff Bank sued the defendant company for recovery of a certain sum due in respect of money advanced by the Bank to the company, for future interest and for a lien on all the raw materials and manufactured goods of the company until satisfaction. It was contended on behalf of the defendant that the borrowing by the directors from the Bank was in excess of their powers.

Held, that the borrowing by the directors in so far as it was in excess of their powers was impliedly ratified and sanctioned by the share-holders at general meetings. The passing of accounts and declaration of dividends constituted sanction and ratification of the borrowing in excess. 106 P.L.R. 1902. Q

It is true that persons who deal with a company whose regulations are registered and are therefore, accessible to the public cannot hold the company liable if the directors exceed the authority disclosed by the regulations, *Ernest v. Nicholls*, 6 H.L.C. 401 and *Fountaine v. Carmarthen Railway Company*; 5 Eq., 816: but “it may be taken as

I.—“The business of the Company....directors ”—(Continued).

now settled that persons dealing with directors *bona fide* and without notice of irregular or improper exercise of their powers are not affected by such irregularity or impropriety.” Lindley Ed. 5 p. 167—106 P.L.R. 1902. **R**

In *Royal British Bank v. Turquand*, 5 E. & B. 248 and 6 ib. 327, it was held that parties dealing with companies were bound to read the Statute and deed of settlement, but were not bound to do more and that if a party, on reading the deed, found not a prohibition from borrowing but a permission to borrow under certain conditions he would have a right to infer the fact of a resolution authorising that which, on the face of the document, appeared to be legitimately done. 106 P.L.R. 1902. **S**

In *Agar v. Athenaeum Life Assurance Society*, 3 C.B.N.S. 725, the directors had power to borrow only with consent of an extraordinary General Meeting of share-holders. They did borrow by issuing debentures sealed with the seal of the company and signed by two directors. It was held that the debentures bound the company although no authority was conferred by an extraordinary general meeting. (*Ibid*). **T**

In order that ratification by the share-holders or their agents may be proved it must be shown. “(1). That the parties alleged to have ratified the contract knew what it was or, having their attention drawn to it, did not choose to inquire into it, and (2). That they have, in some way recognized and adopted it.” Lindley Ed. 5, p. 177. **U**

The ratification by a company of particular acts done by its directors in excess of the authority given them by the articles of the company, does not extend the powers of the directors, so as to give validity to acts of a similar character done subsequently. 3 C. 28 D. (281). **V**

A ratification is in law treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorise an act, cannot give it validity by ratifying it. 3 C. 280 (285). **W**

(11) Directors, fraudulent acts of.

(a) The directors are not the agents of the body of share-holders to commit a fraud. *Dodgson's case*, 3 De G. and Sm. 85, 90. **X**

(b) A company is not bound by a fraudulent and illegal agreement entered into by its directors on its behalf. *British and American Telegraph Co. v. Albion Bank*, L.R. 7 Ex. 119, 122. **Y**

(c) A company is not liable in an action of deceit where the unauthorised and fraudulent act of the agent is committed for meeting his own private ends. *British Mutual Co. v. Charnwood Forest Co.*, 18 Q.B. Div. 714. **Z**

(12) Directors—Company liable for misrepresentations of agents to what extent.

(a) The company, to some extent, must take on itself the consequences of the misrepresentations of its agents whereby a contract has been induced between the company and a third party. *Western Bank of Scotland v. Addie*, L.R. 1 H.L. Sc. 145, 157. **A**

(b) A company is liable to an action for the false or fraudulent misrepresentation of its agent acting in the course of business. *Barwick v. English Joint-Stock Bank*, L.R. 2 Ex. 259. **B**

1.—“The business of the Company . . . directors” —(Continued).

- (c) But, if an officer, not being a director, answers inquiries not properly falling within the business of the company deputed to him, his representations, cannot, in the absence of evidence, be imputed to the directors, and through them to the company. *Partridge v. Albert Life Assurance Co.*, (Alb-Arb.) 16 Sol. J. 199. **C**
- (d) Where directors by a misrepresentation of fact induce dealings with their company, which do not bind the company, they are, as is always the case where an agent makes a misrepresentation in point of fact as to his power to bind his principal, liable personally to make good the representation they had made. *Cherry v. Colonial Bank of Australasia*, L.R. 3 P.O. 24. **D**
- (e) But if the misrepresentation be not of fact, but be only a mistaken representation of the law, this is not such a representation as the directors, as agents, are personally liable to make good. *Beattie v. Lord Ebury*, 7 Ch. 777=L.R. 7 H.L. 102. **E**

(13) Directors—Personal liability.

The directors of a company are *agents of the company and trustee for the share-holders*, of the powers committed to them. In the first character, that of agents, their personal liability in an action, on a contract made by them, must be governed by the ordinary law of principal and agent. The directors cannot, therefore, be brought into court as personally liable, on a proceeding which simply alleges that the company has violated a contract that they have entered into. In that state of things it is not the agent, but the principal that is the person liable. But a share-holder may sue directors, personally, when he charges them as trustees, and seeks redress against them for a breach of duty to the company of which he is a member. For in that case the allegation of the share-holder in fact is that the company has done no wrong, that it is the executive that has committed the wrong, and the share-holder sues to protect the company against the unlawful acts of the directors. *Ferguson v. Wilson*, 2 Ch. 77; *Wilson v. Lord Ebury*, 5 Q.B. Div. 518. **F**

(14) Directors—Trustees of powers committed to them.

Directors are trustees of the powers committed to them, (they being also entitled to the benefits of their character as trustees so as to be entitled to indemnity from their *cestui que trust* for expenses *bona fide* incurred). *German Mining Co. v. P. Chippendale*, 4 D. M. & G. 19, 52. **G**

INSTANCES.

Directors are trustees:—

- (i) of the power of approving transfers of shares. *Bennett's case*, 5 D. M. & G. 284; **H**
- (ii) of the power of allotment of shares. *Fraser v. Whalley*, 2 H. & M. 10; *Punt v. Symons & Co.*, 1903, 2 Ch. 506; **I**
- (iii) of the power of employing the funds of the company. *Land Credit Co. of Ireland v. Lord Fermoy*, 8 Eq. 7, 11=5 Ch. 793; **J**
- (iv) (a) of the power of making calls. *Gillbert's case*, 5 Ch. 529; **K**
- (b) of receiving payment of calls in advance. *Sykes case*, 13 Eq. 255;

1.—“The business of the Company....directors” —(Continued).

(v) of the power of forfeiting shares. *Harris v. North Devon Railway Co.*, 20 Beav. 384. M

N.B.—As trustees they may be rendered liable for their misuse. *Charitable Corporation v. Sutton*, 2 Atk. 400. N

(15) Directors not trustees.

N.B.—The Directors are not trustees for individual share-holders. *Fercival v. Wright*, (1902), 2 Ch. 421. O

(16) Directors liable—Instances.

Cases by which the liability of directors to make good funds of the company illegally appropriated to purposes foreign to those of the company is established are :—

Madrid Bank v. Pelly, 7 Eq. 442; *Parker v. McKenna*, 10 Ch. 96; *Land Credit Co. of Ireland v. Lord Fermoy*, 8 Eq. 7 = 5 Ch. 763; *Joint-Stock Discount Co.*, v. *Brown*, 8 Eq. 381; *Gray v. Lewis*, 8 Eq. 526; *Parker v. Lewis*, 28 L.T. 91; *Re Reese River Silver Mining Co.*, 1867, W.N. 139, *General Exchange Bank v. Horner*, 9 Eq. 480; *Imperial Mercantile Credit Association v. Chapman*, 19 W.R. 379; *London, Hamburg and Continental Bank Zuleug's claim*, 9 Eq. 270; *Masonic Co. v. Sharpe*, 1892, 1 Ch. 154. P

(17) Director—Trustee—Distinction.

“The distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property but that is a rare, exceptional and casual circumstance. The office of a director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contract for his principal, that is, for the company of which he is a director, and for whom he is acting. He cannot sue on such contracts, nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction, between directors and trustees.” *James, L.J., Smith v. Anderson*, 15 Ch Div. 247, 275. Q

(18) Director liable for negligence.

A director is liable for negligence in performance of his duties. *General Light Co. v. Marzetti's case*, 28 W.R. 541 = 42 L.T. 206. R

(19) Directors—*Crassa negligentia*.

Facts shewing imprudence in the exercise of powers undoubtedly conferred on directors will not subject them to personal responsibility unless the imprudence be so great and so manifest as to amount to *crassa negligentia*. Directors acting for the company as its agents, are bound to use the same amount of prudence, which in the same circumstance, they would exercise on their own behalf; but if they are empowered to do an act imprudent in itself, they are not to be held responsible for the consequences of doing it. *Overend & Gurney Co. v. Gibb*, L.R. 5 H.L. 480 = S.C. 4 Ch. 701. S

1.—“The business of the Company....directors”—(Continued).

(20) Director—Mere *bona fide* error of judgment.

The Court will not visit directors with the consequences of a mere error of judgment when they have acted *bona fide* and have intended to do what was right and best for the interests of the company. *Re Brighton Brewery Co. v. Hunt's*, case, 37 L.J. (Ch). 278, 280=16 W.R. 472. T

(21) Director not to be held liable on very strict rules.

“A Director should not be held liable upon any very strict rules, such as those in my opinion too strict rules which were laid down by the Court of Chancery to make unfortunate trustees liable; directors are not to be made liable on those strict rules which have been applied to trustees.” *Per James, L.J. Marzett's* case, 28 W.R. 542, 543. U

(22) Director—Gross negligence—Imprudence—Liability.

The director must be “guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law.” *Per Brett, J. (Ibid)*. Y

“If directors are within their powers, if they act with such care as is reasonably, to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company. The amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them. Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. I do not know how better to describe it.” *Lindley, M.R. Lagunas Nitrate Co. v. Lagunas Syndicate*, 1899, 2 Ch. 392, 435. W

Directors were held liable for acting otherwise than as men with any ordinary degree of prudence would have acted on their own behalf. *In Merchants Fire Office v. Armstrong*, 1901, W.N. 163. X

(23) Directors—Fraud—Interference by Court.

(a) If directors keep within their powers, the Court cannot interfere with their discretion, however foolish their conduct may appear. But if it be shewn that their conduct has been prompted by improper motives and not merely by default of judgment, the Court will interfere. *Turquand v. Marshall*, 4 Ch. 376, 386. Y

(b) If they use their powers improperly, they will be restrained. *Cannon v. Trask*, 20 Eq. 669. Z

(24) Directors paying dividend improperly.

(a) Directors are *quasi* trustees of the capital of the Company. *Ramshill v. Edwards*, 31 Ch. D. 100. A

(b) Directors who improperly pay dividends out of capital are liable to repay such dividends personally on the company being wound up.

(c) This liability may be enforced by a creditor or by the liquidator under S. 214 *supra* or by the incorporated company before a winding-up.

(d) The acquiescence of the share-holders does not affect the creditors in such a case.

1.—“*The business of the Company....directors*”—(Continued).

- (e) Such act is a breach of trust.

[See Buckley on Companies (Consolidation) Act, 1908, p. 631.]

See *Lands Allotment Co.* 1894, 1 Ch. 616; *Oxford Building Society*, 35 Ch. D. 509. B

(25) Director—Payment of dividend—No fraud.

If, however, there be no fraud and the director acted in the honest belief that as a matter of fact there were profits when there were not, then notwithstanding that in the true facts the payment of the dividend was *ultra vires*, *Williams, J.*, had held that the director is not liable. *Ramskill v. Edwards*, 31 Ch. D. 100. C

(26) Directors misappropriating money.

The directors who misappropriate the money (even if not parties to the resolution directing the misappropriation) are liable. *Lands Allotment Co.*, 1894, 1 Ch. 616, 636. D

But a director who is no party to the misappropriation does not come under liability by reason of the fact that he concurred in a resolution authorizing a certain course of practice (such as the investment of the company's funds on securities which it could not legally take) in pursuance of which a certain particular investment was subsequently without his concurrence made by other members of the Board. *Cullerne v. London and Suburban Soc.*, 25 Q.B. Div. 485. E

(27) Directors—Dividend improperly paid—Proceedings by share-holders.

The share-holders cannot as a body make the directors liable to repay the gross amount of dividends improperly paid; the injury is not one common to all the share-holders, but may affect each in a different manner. If any share-holder has been deceived and induced to remain longer in the concern, and has thereby incurred loss, this may be the subject of an action but in such a case each share-holder must proceed individually in respect of his own damage. *Tarquand v. Marshall*, 6 Eq., 112, 181=4 Ch. 376, 385. F

(28) Directors cannot plead ignorance.

- (a) It is the duty of the directors, a duty which they have undertaken to perform in becoming directors, to be acquainted with the proceedings of the board of which they are members. A director cannot, therefore, *semble*, escape liability by professing ignorance of a state of affairs which he might have learned from the books of the company. *Tarquand v. Marshall*, 6 Eq. 112, 180. G

- (b) But knowledge will not be imputed to him of all the entries in the books. *Hallmark's case*, 9 Ch. D. 329. H

- (c) A director cannot justify himself for sanctioning an improper payment out of the funds of the Company by asserting ignorance of the purpose to which it was to be applied. A plea of ignorance in such a case is a plea of guilty. *Land Credit Co. of Ireland v. Lord Fermoy*, 8 Eq. 7, 11. I

- (d) But he is not responsible if the proceeds of a cheque drawn with his sanction for a lawful purpose, are misappropriated. *Perry's case*, 34 L. T. 716. J

1.—“The business of the Company...directors”—(Continued).

- (e) A director who, knowing the improper character of a proposed transaction, contents himself with protesting, and then does nothing more, stands by no means in a better position than his fellows. *Joint-Stock Discount Co. v. Brown*, 8 Eq. 381, 402, *Ramskill v. Edwards*, 31 Ch. D. 100. K
- (f) Moreover, a director will not be heard to say that he signed a cheque as a merely ministerial act. The provisions by which a company guards against a misapplication of its funds by requiring that cheques shall be signed by certain persons of course imply that each of those persons takes care to inform himself that the payment is a proper one, or if he does not so inform himself is prepared to take the risk of not doing so. *Joint-Stock Discount Co. v. Brown*, 8 Eq. 404.
- (g) The signing of a cheque may be an adoption of the whole transaction. *Ramskill v. Edwards*, 31 Ch. D. 100. L
- (h) But a director cannot be held liable for being defrauded. Therefore, where the directors, under a power in the deed appointed an executive committee, and the committee reported to a meeting of the directors certain cheques as having been drawn for loans, and the directors approved them, a director who was present, but denied all knowledge of the improper transaction in respect of which the cheques were in fact drawn, was held not to be liable to replace the money. *Land Credit Co. of Ireland v. Lord Fermoy*, 5 Ch. 763.
- (i) And where dividends were paid out of capital upon accounts which had been fraudulently manipulated, a director who had no knowledge and no grounds for suspecting misconduct was not liable. *Denham & Co.*, 25 Ch. D. 752. M
- (j) A director cannot necessarily be fixed with liability in respect of acts of his co-directors of which he had no knowledge and in which he had taken no part. *Perry's case*, 34 L.T. 716. But see *Charitable Corporation v. Sutton*, 2 Atk. 400: see, also, *Young v. Naval Soc.* 1905, 1 K.B. 687. N
- (k) He is liable only for his own personal fraud, or for the fraud of his co-directors or of any other agent of the company, which he has expressly authorized or at which he has connived. *Weir v. Barnett*, 3 Ex. D. 82.
- (l) But if he be brought into Court upon proceedings against his co-directors he will probably be left to pay his own costs. *Joint-Stock Discount Co. v. Brown*, 8 Eq. 381, 401. O
- (29) Directors—Contribution.
- (a) If one director is rendered liable to the company for misapplication of the company's funds (*e.g.*, for advancing upon unauthorized securities), he can maintain an action against his co-directors for contribution. *Ramskill v. Edwards*, 31 Ch. D. 100. P
- (b) It is a “liability incurred by means of a breach of trust,” so as not to be discharged by liquidation proceedings. (*Ibid.*) Q
- (30) Director, knowledge of—Notice.
- (a) A director will be taken to know that which in the performance of the trust which he had undertaken to perform for the benefit of the company it was his duty to know. *E. P. Brown*, 19 Beav. 97, 104. R

1.—“The business of the Company....directors ”—(Continued).

- (b) Complete knowledge of the provisions of the deed of settlement or articles of association will be ascribed to him. *Lane's case*, I.D.J. & S. 504, 506. S
- (c) But he will not be taken to have notice of everything that may be discovered from entries in the company's books. *Hallmark's case*, 9 Ch. Div. 329. T
- (d) Where the manager of the company had, in excess of his powers, purchased the company's shares and registered transfers of them to those two of the directors who were trustees for the purchase of shares on the company's account, they were held not to be affected with knowledge of the transaction. *Cartmell's case*, 9 Ch. 691. U
- (e) The knowledge of a director is not necessarily the knowledge of the company. *Peruvian Railways Co. v. Thames, etc., Insurance Co.*, 2 Ch. 617. Y
- (f) A director is simply a person appointed to act as one of a Board, with power to bind the company when acting as one of a Board, but not otherwise. Because the same person is a common director of two companies, the one company has not necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company, any more than it can be supposed to have knowledge of everything the director knows about his own private affairs. *Re Marseilles Extension Railway Co., E. P. Credit Foncier*, 7 Ch. 161, 168, 170; *Young v. David Payne & Co.*, 2 Ch. 608. W
- (g) A company is not affected with notice through the knowledge of its sole director, when the imputation of notice would have necessarily involved that the director had disclosed to the company his own fraud. *Re European Bank E. P. Oriental Commercial Bank*, 5 Ch. 358. X

(31) Notice to Secretary.

- (a) If the same man be secretary of two companies, knowledge as secretary of the one company is not necessarily notice to the other company. In order to make it notice it must be shown that it was his duty to the first company to communicate the fact to the second. *Fenwick Stobert & Co.*, (1902) 1 Ch. 507. Y
- (b) Casual notice brought home to the secretary, not as secretary, but as an individual, is not notice to the company. *Societe-General v. Tramways Union*, 14 Q.B. Div. 424, 438. Z

(32) Directors *de facto*.

- (a) A stranger dealing with a company has a right to assume, as against the company, that all matters of internal management have been duly complied with. *Royal British Bank v. Turquand*, 5 E. & B. 248. Z-1
- (b) So, where a person effected at the office of an Insurance Company a policy, which was signed by three persons who were acting directors *de facto* although not directors *de jure*, and sealed with what purported to be the company's seal, it was held that the policy was binding on the company. *Re County Life Assurance Co.*, 5 Ch. 288. A
- (c) Where the directors had by the articles power to fix their quorum, a third party was entitled to assume that a proper quorum had attended

1.—“*The business of the Company....directors*”—(Concluded).

to complete an instrument which purported to be duly executed by the company. *County of Gloucester Bank v. Rudry Co.*, (1895) 1 Ch. 629. B

(d) (i) Where the company's bankers received from the company's office a formal notice signed by the “secretary” that they were to pay cheques signed by “either two of the following three directors” they were entitled to pay on cheques so signed although no directors or secretary had really ever been appointed. *Mahony v. East Holyford Mining Co.*, L.R., 7 H. L. 869. C

(ii) *Secus*, if there be constructive notice. *Irvine v. Union Bank of Australia*, 2 A.C. 366, 379. D

(e) But this principle does not apply to the case where an agent of the company has done something beyond any authority which was given to him, or which he was held out as having. *Cartmell's case*, 9 Ch. 691. E

(33) Directors, authority of—Effect of bye-laws—Notice.

Though, it must be taken to be settled, that persons dealing with a registered company are bound to acquaint themselves with the limits imposed by the deed of settlement or articles of association, on the authority of the directors. *Earnest v. Nicholls*, 6 H.L.C. 401, 419. Yet strangers to the company dealing with directors cannot be affected by bye-laws, which may under the articles be from time to time made and varied by the directors, unless notice of such bye-laws is proved. *Royal Bank of India case*, 4 Ch. 252. F

(56) The continuing directors may act notwithstanding any vacancy in their body¹.

(Notes).

Corresponding English Law.

Cf. Art. 89, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. G

1.—“*The continuing....body.*”

(1) Directors—Board of directors—Quorum of three members—Only one member remaining on Board.

A Resolution of the directors of a company provided that three members should form a quorum at the meeting of the directors. Of the three directors, two resigned, leaving only one in charge of the affairs of the company. The accounts of the company having been prepared, the question arose as to how and who should pass the accounts. On the director applying to the Court for directions: *Held*, that three courses were open to the directors.

(i) The director can get five members of the company to summon a meeting under S. 78 of the Indian Companies Act, 1882.

(ii) The director himself can call an extraordinary general meeting and his act in doing so would be valid under Art. 71, *infra*.

(iii) The director can move the Court to call a general meeting. 8 Bom. L.R. 478. H

(2) Continuing directors—Quorum—English Law.

Quare:—Whether the continuing directors can act if less than a quorum.

Owen and Ashworth's claim, (1900) 2 Ch. 272 (278). I

Disqualification of Directors.

(57) The office of director shall be vacated ¹—

if he, or any partner of his, or the firm of which he is a member, holds any other office ² or place of profit under the Company ;

if he becomes bankrupt ³ or insolvent ;

if he is punished under any of the penal provisions of the foregoing Act ;

if he is concerned in or participates in the profits of any contract with the Company ⁴.

But the above rules shall be subject to the following exceptions :—that no director shall vacate his office by reason of his being a member of any Company which has entered into contracts with, or done any work for, the Company of which he is director ; nevertheless, he shall not vote in respect of such contract or work ; and, if he does so vote, his vote shall not be counted.

*(Notes).***Corresponding English Law.**

The office of director shall be vacated, if the director—

(a) ceases to be a director by virtue of S. 73 of the Companies (Consolidation) Act, 1908 ; or

(b) holds any other office of profit under the company except that of managing director or manager ; or

(c) becomes bankrupt ; or

(d) is found lunatic or becomes of unsound mind ; or

(e) is concerned or participates in the profits of any contract with the company :

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director : but a director shall not vote in respect of any such contract or work, and if he does so vote his vote shall not be counted.

[Art. 77, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] J

*1.—“ The office . . . vacated.”***(1) Articles naming events whereon to vacate.**

Where the Articles name events upon which a director shall vacate his office, the office is vacant on the happening of the event. The Board cannot waive the event or condone the act. *Bodega Co.*, (1904), 1 Ch. 276. K

(2) Director absenting himself.

It is sometimes provided that a director's office is to be vacated in case he absents himself from directors' meetings for a certain period. In such an article “absenting himself” means being absent voluntarily or deliberately. *Mack's claim*, (1900) W.N. 114. L

1.—“The office....vacated” —(Concluded).

(3) Absence ‘period of’ when begins to run.

The period of absence does not begin to run until a meeting has been held which he ought to attend. *McConnell's claim*, (1901), 1 Ch. 728. M

(4) “Director ceasing to hold qualification shares.”

An article providing that the office of a director shall be vacated on his “ceasing to hold” his qualification, does not cause a director's office to be vacated in case he fails to obtain his qualification within the time prescribed by the articles. *Salton v. New Beeston Co.*, 1899, 1 Ch. 775. N

(5) Resignation.

(a) A director can, subject to the articles, resign his office, and cannot withdraw his resignation without the company's consent. *Glossop v. Glossop*, (1907), 2 Ch. 370. O

(b) Where a director's resignation is accepted by the Board, he is not liable for a report made and a dividend recommended after that time, though his resignation was not disclosed to the company, and he was actually named in the report as a director. *National Bank of Wales*, (1899) 2 Ch. 629. P

2.—“Holds any other office.”

(1) “Holding another office”—Salaried secretary elected director—Such secretary ceasing to receive salary.

In a company whose Articles provided that a director who should accept or hold any other office (omitting the words “of profit”) under the company should cease to be a director, the salaried secretary of the company was elected a director. After his election he ceased to receive his salary as secretary but continued to perform the duties of that office. He was not thereby disqualified from acting as a director. *Iron Ship Coating Co. v. Blunt*, L.R., 3 C.P. 484. Q

(2) Trustee nominated and paid by the company.

A trustee of a deed covering the company's debentures, nominated and paid by the company, holds a place of profit under the company. *Astly v. New Tyrol*, (1899), 1 Ch. 151. R

3.—“Becomes bankrupt.”

“Becomes bankrupt,” scope of the expression.

An article in the form “becomes bankrupt” does not prevent the appointment as a director of a person who is at the time bankrupt. *Dawson v. African Co.*, (1898), 1 Ch. 6. S

4.—“If he is concerned....company.”

(1) Director—Making profits in which he acts for the company.

(a) Upon general rules of equity, a person holding a fiduciary position as director cannot obtain for himself a benefit derived from the employment of the company's funds, unless the company knows and assents. (As to what will amount to sufficient disclosure, see, *Dunne v. English*, 18 Eq. 524.) T

4.—“If he is concerned....company”—(Concluded).

- (b) No director can, in the absence of a stipulation to the contrary, partake in in any benefit from a contract which requires the sanction of a Board of which he is a member. He stands in a fiduciary position towards the company, and if he makes any profit when he is acting for the company, he must account to the company. *Imperial Mercantile Credit Association v. Coleman*, 6 Ch. 558, 566. U

(2) Director acting for company trustee.

The company have a right to the entire services of their paid directors. They have a right to the advice of every director on matters brought before the Board for consideration. The general rule that no trustee can derive any benefit from dealing with trust funds will apply with greater force to that state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance. *Benson v. Heathorn*, 1 Y. & C. Ch. 326, 341. Y

(3) Directors acting *bona fide*.

Where directors do an act truly and reasonably believing that it is for the interest of the Company, they are not chargeable with breach of trust, merely because in promoting the interest of the company they are also promoting their own. *Hirche v. Sims*, (1894), A.C. 654 (660). W

(4) Director, right of, to enforce specific performance of contract out of which he is to make profit.

A director cannot come into a Court of Equity for specific performance of a contract, out of which he is to make a profit, and his assignee stands in no better position. *Flanagan v. Great Western Railway Co.*, 7 Eq. 118. X

Rotation of Directors.

(58) At the first ordinary meeting after the registration of the Company, the whole of the directors¹ shall retire from office; and at the first ordinary meeting in every subsequent year, one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

(Notes).

(1) Corresponding English Law.

At the first ordinary meeting of the Company the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or multiple of three, the number nearest to one-third, shall retire from office. [Art. 78, Table A, Sch. I, the English Companies (Consolidation) Act, 1908.] Y

(2) Object of this article.

- (a) The——— is to give the share-holders within a reasonable time the right to elect their own directors and not to leave them under the management of the temporary officers appointed under Art. 52, in whose selection none but the subscribers of the memorandum will have had a voice. See Buckley on the Companies (Consolidation) Act, 1908. Z

- (b) This clause enables the share-holders, if they think fit to get rid of the directors appointed by the subscribers of the Memorandum of Association, and to elect their own directors. If an extraordinary general meeting is held before the ordinary meeting, the directors will not retire at such extraordinary general meeting, but will continue in the office until the first ordinary meeting is held (*Lord Claud Hamilton's case*, (1873) 8 Ch. 548. A

1.—"Directors."

"Directors", scope of the expression.

The expression "directors" does not include mere *de facto* directors, or subscribers of the memorandum of association who were deemed to be directors. *John Morley Building Co. v. Barras*, (1891) 2 Ch. 386. B

(59) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the Company shall, unless the directors agree among themselves, be determined by ballot. In every subsequent year, the one-third or other nearest number who have been longest in office shall retire.

(Note).

Corresponding English Law.

The directors to retire in every year shall be those who have been longest in office since last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot. [Art. 79, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] C

- (60) A retiring director shall be re-eligible.

(Note).

Corresponding English Law.

A retiring director shall be eligible for re-election. [Art. 80, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] D

(61) The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons¹.

(Notes).

Corresponding English Law.

This article is exactly similar to Art. 81, The English Companies (Consolidation) Act, 1908. E

1.—The company....of persons."

(1) Directors to be chosen by whom.

The directors are to be chosen by the Share-holders or by the Board. Where the share-holders are to appoint, an agreement made by the directors by which directors are to be imposed upon the share-holders by another company is illegal. *James v. Eve*, L.R., 6 H.L. 335. F

1.—“The Company... of persons.”—(Concluded).

(2) Directors—Election—Return of poll when to be taken to be good.

At an election of directors the return of the poll must be taken to be good until it is brought into question before a proper tribunal in a proper manner. *Wandsworth Gas Light Co. v. Wright*, 22 L.T. 404. **G**

(62) If, at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if, at such adjourned meeting, the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on, from time to time, until their places are filled up.

(1) Corresponding English Law.

This article is similar to Art. 83, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. **H**

N. B.—For “shall continue——filled up” in this article, we find the following in the English Enactment “shall be deemed to have been re-elected at the adjourned meeting.”

(2) First clause in this article.

The——is directory only. See Buckley on the Companies (Consolidation) Act, 1908. **I**

(3) Meaning of this Article.

The——is that if for any reason either the first meeting or the adjourned meeting at which the election of the directors ought to take place does not proceed validly to fill up the places of the vacating directors, then they are to continue in office. *Great Northern Salt Co., E. P. Kennedy*, 44 Ch. D. 472 (482). **J**

(4) Article inapplicable to *de facto* directors.

This article does not apply to mere *de facto* directors. *John Morley Building Co. v. Barras*, (1891), 2 Ch. 386. **K**

(63) The Company may, from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

(Notes).

Corresponding English Law.

This article is word for word the same as Art. 83, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. **L**

(64) Any casual vacancy occurring in the board of directors may be filled up by the directors¹, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

(Notes).

Corresponding English Law.

This article is almost similar to Art. 84, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. M

1.—“Any casual vacancy....directors.”

Casual vacancy in directorate, who to fill up.

- (a) “Any casual vacancy” is any vacancy arising otherwise than by the retirement in rotation. *Munster v. Cammell Co.*, 21 Ch. D. 187. N
- (b) A casual vacancy occurred in February; the ordinary general meeting in March elected to the places of the directors who retired by rotation, but did not fill up the casual vacancy; the board had power to fill it up subsequently. *Munster v. Cammell Co.*, 21 Ch. D. 188. O
- (c) *Semble*. The general meeting could have filled it up. (*Ibid.*) P
- (d) Where the articles provide that the directors shall not be less than three: that the board may fill up casual vacancies: and that the continuing board may act notwithstanding any vacancy in their body, *quere*, when a casual vacancy occurs in a board of three, can the remaining two fill it up? *York Tramways Co. v. Willows*, 8 Q.B.D. 690 (695). Q

(65) The Company in general meeting may, by a special resolution, remove¹ any director before the expiration of his period of office, and may, by an ordinary resolution, appoint another person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

(Notes).

[See also Notes under S. 77, *supra*.]

Corresponding English Law.

This article is almost similar to Art. 86, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. R

N.B.—For the expression “Special resolution” we find in the English Enactment “Extraordinary resolution.”

1.—“The Company.....remove.”

(1) Directors, power to remove—appointed for definite period.

- (a) Whether there is or not in a corporation an inherent power to remove directors for whom no defined period of office has been fixed, there is no such inherent power where by the contract between the members their appointment has been made for a definite period. *Imp Hydropathic Co. v. Hampson*, 23 Ch. Div. 1; *Boschoek Co. v. Pike*. (1906), 1 Ch. 148. S
- (b) Unless the Articles of Association contain a power of removal of such directors, the articles must first be altered, by inserting a power, and then the exercise of the power must follow. (*Ibid.*) T
- (c) Where the articles therefore defined a period of office and the company passed and confirmed a special resolution, not altering the articles, but removing certain directors and appointing others, the removal was ineffectual. (*Ibid.*) U

1.—“*The Company.....remove.*”—(Concluded).

(2) Directors, removal of—Interference by Court.

(a) But if the majority of the share-holders are in fact opposed to certain persons being directors, the Court may refuse to interfere by interlocutory injunction in favour of the persons whom the majority disapprove, notwithstanding that they have not been effectually removed. *Harben v. Phillips*, 23 Ch. Div. 14. Y

(b) “It is a very difficult thing to say that the Court will not interfere to force a director on a company, and to say that a company cannot ask the Court to restrain a particular man from acting as a director, if the resolution by which they have attempted to remove him has been ineffectual.” (*Ibid.*) W

(3) Director, removal of, for negligence, etc.

Where power is given by the articles to remove a director “for negligence, misconduct in office, or any other reasonable cause,” this means such a cause as shall be deemed reasonable not by a Court of justice, but by the share-holders assembled at a meeting duly convened. In the absence of proof of direct fraud, therefore, the Court has no jurisdiction, and will refuse to interfere or determine whether the decision of the meeting has or has not been unduly influenced by unfounded statements. *Inderwick v. Snell*, 2 Mac. & G. 216. X

(4) Director, stipulation that a, shall not be removable.

Quære.—Whether a ——— will be enforced by the Court. *Brownse v. La Trinidad*, 37 Ch. Div. 1. Y

Proceedings of Directors.

[See notes under S. 92, *supra*.]

(66) The directors may meet¹ together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum² necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors.

(Notes).

Corresponding English Law.

The provisions of this article are found *in extenso* in Arts. 87, 88, Table A, The English Companies (Consolidation) Act, 1908. Z

N.B.—In the English Enactment we find that the Secretary too is authorised to summon a meeting of the directors on the requisition of a director.

1.—“*The directors may meet.*”

(1) Directors—Meeting—Notice.

(a) Every member of the Board ought no doubt in the absence of special circumstance. [*Halifax Sugar Co. v. Franklyn*, 59 L.J. (Ch.) 591] to have sufficient notice of each meeting, and a director cannot waive his right to notice. Notice of every meeting, but not of the business to be transacted must be given to every director. *Portuguese Copper Mines Steele's*, (1889), 42 Ch. Div. 160. A

1.—“The directors may meet.”—(Concluded).

- (b) If such notice has not been given, and a few of the directors purport to overrule the previous decision of all, without giving the rest an opportunity of attending, their act will be void. *Homer Mines E. P. Smith*, 39 Ch. D. 546. **B**
- (c) But notice of the business as distinguished from notice of the meeting, is not necessary. In the case of special business it may be prudent and right to give notice of it, but it is not legally necessary to do so. *La Compagnie de Mayrille v. Whitley*, (1896), 1 Ch. 738. **C**
- (d) If there has been an irregularity in giving notice, and the party complaining has not intervened at once, but has allowed action to be taken on the proceedings of the board as in fact convened, and the irregularity is one which could be cured, a Court of Equity will not interfere. *Broune v. La Trinidad*, 37 Ch. Div. 1. **D**

(2) *Ibid*—Minimum number.

Where the articles or deed of settlement provide that there shall be a certain number of directors, this may be either imperative (*Kirk v. Bell*, 16 Q.B. 290); or directory. *Thomas Haven Dock Co. v. Rose*. 4 Man. 552. **E**

(3) *Ibid*—Disputes among directors—Interference by Court.

If there are such dissensions among the governing body of a company as that its affairs cannot be properly carried on, the Court will so far deviate from the general rule of refusing to interfere in matters of internal management as to grant an injunction and receiver to protect the property of the company; but the interference of the Court will be continued only until a governing body is duly appointed, and as soon as this is done the Court will leave the company again to manage its own concerns. *Featherstone v. Cooke*, 16 Eq. 298. **F**

(4) *Ibid*—Exclusion—Personal right to admission.

A director excluded by his co-directors from the board, has a personal right to compel them to admit him. *Pulbrook v. Richmond*, 9 Ch. D. 610. **G**

(5) *Ibid*—Order of business to be considered.

The directors are entitled at their meetings to take their business in such order as they think proper. *Cawley & Co.*, 42 Ch. D. 209. **H**

2.—“Determine the quorum.”

[See also notes under S. 77 at p. 238, *supra*.]

(1) *Quorum*, articles giving power to fix—Presumption.

Where the articles give the directors power to fix the quorum, an outside person, who does not know what quorum has in fact been fixed, is entitled to assume that the proper quorum has been properly summoned and has attended to effect the completion of a document which purports on the face of it to have been duly executed by the Company. *County of Gloucester Bank v. Rudry Merthyr Co.*, (1895), 1 Ch. 629; see *Queen and Ashworth's Claim*, (1901), 1 Ch. 115. **I**

(2) *Quorum* of persons competent to vote.

The quorum must be a quorum of persons competent to vote at the board in question. If the quorum be two and the business be business on which A and B cannot vote, the presence of A, B and C does not make a quorum. *Greymouth Co.*, (1904), 1 Ch. 32. **J**

2.—“Determine the quorum.”—(Concluded).

(3) *Quorum*—Number of directors three.

When the number of directors is three a majority of them must attend to form a *quorum*. *York Tramways Co. v. Willows*, (1876), 8 Q.B.D. 685. K

(4) *Quorum*, Articles not prescribing number for.

Where the articles do not prescribe the number of directors required to form *quorum*, the number who usually act in conducting the business of the company will be a *quorum*. *Re Regent's Canal Iron Co.*, (1867), W.N. 79. L

(67) The directors may elect a chairman¹ of their meetings, and determine the period for which he is to hold office; but, if no such chairman is elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

(Notes).

Corresponding English Law.

This article is more or less similar to Art. 90, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. M

N.B.—According to the English Enactment directors *may* choose one of them as chairman, if the chairman is not present within 5 minutes after the time appointed.

1.—“Chairman.”

[See notes under S. 77 at p. 243, *supra*.]

(68) The directors may delegate any of their powers to committees¹ consisting of such member or members of their body as they think fit. Any Committee so formed shall, in the exercise of the powers so delegated², conform to any regulations that may be imposed on it by the directors.

(Notes).

Corresponding English Law.

This article is word for word the same as Art. 91, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. N

1.—“Directors....committees.”

(1) Committee of board—One person.

A committee of directors may consist of one person. *Taurine Co.*, 25 Ch. Div. 118. O

(2) Directors, agents—Delegation.

(a) The directors themselves being agents, the rule *delegatus non potest delegare* is *prima facie* applicable to them. *Howard's case*, 1 Ch. 561. P

(b) But, there being under this article power to delegate, delegated authority will be presumed where one or two directors act in a manner properly within the ordinary business of the company. *Totterdell v. Fareham Blue Brick Co.*, L.R. 1 C.P. 674. Q

1.—“*Directors.....committees.*”—(Concluded).

- (c) In the absence of express power to delegate, directors cannot delegate powers which they would not have possessed if not expressly conferred.
Howard's case, (1866), 1 Ch. 561. R

2.—“*Any Committee.....delegated.*”(1) **Debt by agent—Liability of company.**

The company is liable to pay debt contracted by an agent authorised to do so.
 6 B. 326. S

(2) **Agent—Personal liability.**

An agent acting as such is not personally liable. 3 P.R. 1867. T

(3) **Agent—Personal profit.**

But an agent should not obtain personal profit or benefit. 1 I. J. N. S.
 295 (378). U

(4) **Plaint improperly verified.**

The suit was by a limited Company, and the plaint was verified by a gentleman of the name of Hoskins, who was described in the plaint as being the principal agent in Bengal on behalf of the plaintiff Company, and competent to prove everything in connection with the present suit. He had verified the plaint in these terms:—“The particulars set forth in this plaint and in the account are true to my information and belief.” It was said that this was not a sufficient verification within the meaning of S. 435, C.P.C., 1882, the language of which was that the verification might be made by “any other principal officer of the Corporation or Company who is able to depose to the facts of the case.” It was said that Mr. Hoskins could not depose to the facts of the case because he only spoke from information and belief. But the section says nothing about actual personal knowledge on the part of the verifier as the Code does in S. 52. That section shows that a verifier may depose upon his information and belief, and there is nothing in S. 435 to say that he can only depose from his own personal knowledge. The verification was held to be sufficient. But even if this view is not correct leave ought to have been granted to the plaintiff to amend the plaint, and the suit ought not to have been dismissed. 9 C.W.N. 618 (619). Y

(69) A committee may elect a chairman¹ of its meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

(Notes).

Corresponding English Law.

This article is exactly similar to Art. 92, Table A, The English Companies (Consolidation) Act, 1908. W

N.B.—According to the English Enactment the Committee is authorised to elect one of their number, if the Chairman is not present within 5 minutes after the appointed time.

1.—“*Chairman.*”

[See notes under S. 77 at p. 243, *supra.*]

(70) A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority¹ of votes of the members present; and, in case of an equality of votes, the chairman shall have a second or casting vote².

(Notes).

Corresponding English Law

This article is word for word the same as Art. 93, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. X

1.—“Majority.”

Quorum—Majority.

Unless otherwise determined by the committee, a majority must attend to form a *quorum*. *York Tramways Co. v. Willows*, (1878), 8 Q.B.D. 685. Y

2.—“Casting vote.”

Casting vote.

The Chairman has usually a casting vote. *Evans and Cooper*, p. 76. Z

(71) All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered¹ that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid² as if every such person had been duly appointed and was qualified to be a director.

(Notes).

Corresponding English Law.

This article is word for word the same as Art. 94, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. A

1.—“Afterwards discovered.”

Subsequent discovery.

The subsequent discovery referred to is not a discovery of the facts, but a discovery that the facts constitute a defect. *British Asbestos Co. v. Boyd*, (1908), 2 Ch. 439. B

2.—“As valid.”

(1) Scope of Article.

(a) The article validates the acts not only as between the company and outsiders, but as between the members *inter se*. *Dawson v. African Trading Co.*, (1898), 1 Ch. 6. C

(b) While the article in proper circumstances validates the man's act as if he held the office, it does not validate his tenure of the office, *e.g.*, so as to entitle him to the remuneration attached to it. *E. P. Birkenshaw*, (1904), 2 K.B. 327. D

(2) Invalid appointments of directors, etc.—Validity of their acts.

(a) Outsiders are bound to know what Lord Hatherley called the “external position of the company;” but are not bound to know its “*indoor management*.” *Mahony v. East Holyford Mining Co.*, L.R. 7 H.L. 869 (898). E

2.—“*As valid.*”—(Concluded).

- (b) If persons are held out as, and act as directors, and the shareholders do not prevent them from so doing, outsiders are entitled to assume that they are directors, and, as between the company and such outsiders, the acts of such directors *de facto* will bind the company. (*Ibid*)
Cf. County of Gloucester Bank v. Rudry, (1895), 1 Ch. 629. F
- (c) Bankers who received from the company's offices a formal notice signed by the “Secretary” that they were to pay cheques signed by “either two of the following three directors,” and who paid cheques accordingly, were discharged, although no directors or secretary had ever been appointed. (*Ibid.*) G
- N.B.—In this case it was vainly argued that the Act applied, only where there had been an appointment though invalid, and did not apply where there was no appointment at all.
- (d) As against the director himself this article may render his acts as director valid. *York Tramways Co v. Willows*, 8 Q.B. Div. 685. H
- (e) If absence of notice to the contrary be rightly taken to be of the essence, it follows, as has been held, that while the saving clause applies to acts done before the invalidity of the appointment is shown (*Hallows v. Fernie*, 3 Ch. 467, 473) yet when a defect has been discovered, it does not give validity to subsequent acts. *Bridport Old Brewery Co.*, 2 Ch. 191. I
- (f) This article may cover the point and validate the acts of the director not only as between the company and outsiders, but as between the company and the members or between the members *inter se*. *Dawson v. African Consolidated Co.*, (1898), 1 Ch. 6. J

Dividends.[See notes under S. 214, *supra*.]

(72) The directors¹ may, with the sanction of the Company in general meeting, declare a dividend² to be paid to the members³ in proportion to their shares.

(Notes).

Corresponding English Law.

The Company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors. [Art. 95, Table A, Sch. I, The English Companies (Consolidation) Act, 1908.] K

The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the Company. [Art. 96, (*Ibid.*)] L

1.—“*Directors.*”

Company—Power of directors to deal with profits either by declaring dividend or by appropriating to reserve fund—Power of share-holders to interfere with declaration of dividend.

Where the articles of association of a certain Company provided that (a) the directors of the Company might, with the sanction of the Company, in general meeting, declare a dividend, and (b) that the directors may, before recommending any dividend, set aside out of the profits, such

1.—“Directors”—(Concluded).

sum as they think proper as a reserve fund to meet contingencies or for equalising dividends, etc., and where the directors passed a portion of the profits of a certain year to the reserve fund and diminished the amount of dividend they could otherwise have declared, and the defendant thereupon, representing a party among the share-holders, contended (1) that the share-holders have the right, by duly carried resolution, to withdraw that sum so set apart, or a part of it, from the reserve fund, for the purpose of increasing the dividend, and (2) that have the right to direct the directors to declare a dividend out of the amount standing to profit and loss, including the sum so withdrawn, *held* that under the articles of association of the Company the contention of the share-holders was not maintainable. As the reserve fund consisted of profits, and the disposal of profits was under the articles entrusted to the directors expressly, the share-holders cannot be permitted to withdraw this sum from the reserve fund. Further, the share-holders cannot direct the directors to declare a dividend out of the withdrawn sum. Under the articles, the shareholders had agreed that the directors shall declare the dividends, only reserving to themselves the power of vetoing any objectionable dividend. The remedy of the share-holders, if they are dissatisfied with their officers, lies only in the displacement of the directors or in the legal alteration of the articles. 10 B. 415. M

2.—“May with . . . declare a dividend.”

(1) Dividend, meaning of.

(a) Etymologically a dividend is the “dividendum”, the total divisible sum. But in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. *Lamplough v. Kent Waterworks*, (1903), 1 Ch. 575 (580). N

(b) As to the meaning of the word “dividend” see *Henry v. Great Northern Railway Co.*, 1 De. G. & J. 606, 636, 642, 647. O

(2) Dividend, declaration of.

A company is not bound to divide the whole of its profits amongst its share-holders. Whether the whole or any part shall be divided or what portion shall be divided and what retained are questions of internal management for the decision of the share-holders. The Court has no jurisdiction to control or review their decision. *Burland v. Earle*, (1902), A.C. 95. P

(3) *Ibid*—Action by preference share-holder.

Until a dividend is declared no action can be brought even by a preference share-holder. (*Bond v. Barrow Steel Co.*, (1902) 1 Ch. 362, in the absence of *mala fides*) to enforce its payment. Lindley, 6th. Ed., 609. Q

(4) *Ibid*—Payment.

The declaration of a dividend creates a debt due from the company to each share-holder and payable at the date at which the dividend is made payable. For this debt he can, when that date arrives, sue at law, and the Statute of Limitations begins to run from that date. *Buckley on Companies (Consolidation) Act*, 1908, 649. R

2.—“May with....declare a dividend”—(Concluded).

(5) *Ibid*—Effect—Company not a trustee.

The declaration does not make the company a trustee of the dividend for the share-holder, and an entry of the liability in the company's books—at any rate when no special part of its assets is set aside as representing the dividend, and no notice of the entry is given to the share-holder—does not take the case out of the statute. *Severn and Wye Co.*, (1896), 1 Ch. 559. S

(6) Dividend, *interim*—Authority to pay—Resolution to pay.

The declaration of an *interim* dividend can be cancelled by the directors at any time before payment and does not create a debt as between the company and the member. See *Lagunas Nitrate Co. v. Schroeder*, (1901), 85 L.T. 22. T

(7) Company—Contract, construction of—Preferential dividend payable to holder of one set of shares—Company to pay it to share-holder and to his executors or administrators—Share-holder, death of.

A merchant transferred in 1864 the good will, property, capital and assets of his business to a joint stock limited company, who agreed with him that in consideration of the transfer by him of the property referred to in the contract as “the fixed assets,” he should be entitled to have allotted to him 100 shares in the company of Rs. 2,500 each but that the company should not be bound to give their consent to, or recognise as valid, any assignment of the said 100 shares, or any of them, during a period of five years from the date of the registration of the company. It was also agreed that in consideration of the transfer, he, his executors or administrators shall be entitled, so long as he or they shall hold the said one hundred shares, to an extra or preferential dividend. The parties acted upon this agreement, and the share-holder held the shares till his death in England in 1886, having by his Will directed that his executors or administrators should hold the 100 shares in trust for his surviving brothers of whom the executor who proved the Will was one. Administration with the Will annexed was granted in India to the plaintiff in this suit as the attorney of the executor. A note of this was made by the company in the share register, the shares still standing in the name of the testator. The company then discontinued to pay the preferential dividend, and contended that the estate of the testator was no longer entitled to receive it inasmuch as the executor administered the testator's estate and no longer held the shares as executor but as trustee for the beneficiaries under the Will. *Held*, that the contract was still in operation, the executor still “holding” the shares, within its meaning; that the testator's legal personal representatives were entitled to whatever may be payable in respect of his shares, the company being concerned with the legal title to the shares and not with any equities which the beneficiaries may have as between themselves and their trustees. 19 B. 1 (P.C.). U

3.—“Members.”

Members, scope of the term

“Member” in this article includes the legal personal representatives of a deceased member whose name remains on the register. *James v. Odessa Waterworks Co.*, 42 Ch. D. 636. Y

[N.B.—See also notes under S. 45, *supra*.]

(73) No dividend shall be payable except out of the profits arising from the business¹ of the Company.

(Notes).

Corresponding English Law.

No dividend shall be paid otherwise than out of profits. Art. 97, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. W

Art. 97 of the English Enactment, wider.

Art. 97, Table A, The Companies (Consolidation) Act, 1908 is wider. There may be profits coming not from the business but from other sources. If a company acquires assets and with them carries on business, every increment of value whether by way of appreciation of the assets or by way of profit earned in employing them is in some sense profit. The corporation is so much the richer whether the additional wealth arises from appreciation of assets or by fruit produced by their employment. Buckley on Companies (Consolidation) Act, 1908, 652. X

The word "profits" in the English enactment is general. (*Ibid.*) Y

1.—"No dividend... profits arising from the business."

(1) Profits arising from the business.

(a) As the fund for payment of dividend is under the articles——it is not with every profit or loss that we are concerned but with a particular sort of profit or loss. The relevant profit being "the profit arising from the business of the company," the inquiry arises, what is the business (for which we must look to the memorandum of association) and what are the profits of the trade. (*Ibid.*) Z

(b) The profits of the business are the credit balance of a profit and loss account properly prepared, having regard to the definition of the business in the memorandum of association. They are the excess of revenue receipts over expenses properly chargeable to revenue account. As to what expenses are properly chargeable to capital and what to revenue it is necessarily impossible to lay down any general rule. In many cases it may be for the share-holders to determine this for themselves provided the determination be honest and within legal limits. *Lee v. Neuchatel Asphalte Co.*, 41 Ch. Div. 1, 18, 21, 25. A

(2) *Ibid.*—, available for dividend—Capital account—Revenue accounts—How treated.

For ascertaining profit available for dividend, capital account and revenue account are to be treated as separate accounts. The credit balance of revenue account is applicable for dividend. Under some form of articles appreciation of capital or what may be called credit balance of capital account may also be applicable for dividend. But if there has been loss on revenue account, not compensated by appreciation on capital account there is not under any form of articles profit available for dividend until that loss has been made good. The Articles may, however, allow declaration and payment of dividend without bringing into revenue account or providing for loss on capital account. *Lee v. Neuchatel*, 41 Ch. Div. 22, 23, 24. B

1.—“No dividend....profits arising from the business”^f—(Continued).

(3) *Ibid*—Profit—Capital.

No fixed line can be drawn to distinguish what is capital and what is profit.

“The mode and manner in which a business is carried on and what is usual or the reverse may have a considerable influence in determining the question what may be treated as profits and what as capital.”

Per Lord Halsbury, Dovey v. Cory, (1901), A.C. 486; *Bond v. Barrow Steel Co.*, (1902), 1 Ch. 353. C

(4) **Profits, dividend can only be paid out of—Dividend cannot be paid out of capital.**

The fact is that the law is much more accurately expressed by saying that *dividends cannot be paid out of capital than by saying that they can only be paid out of profits*. The latter expression leads to the inference that the capital must always be kept up and be represented by assets, which if sold would produce it. This is more than the law requires. Fixed capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided. But floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess (seeing that circulating capital, with the particulars of its purchase and sale, must appear in revenue account), in which case to divide such excess without deducting the capital which forms part of it, will be contrary to law. *Per Lindley, L.J., Verner v. Gen. Trust*, (1894), 2 Ch. 266. D

N.B.—Since that decision the Court of Appeal has held that loss incurred by a banking company by reason of bad debts may, for dividend purposes, be thrown on capital account. *National Bank of Wales*, (1899), 2 Ch. 629 (666). E

(5) **Profit, every, not profit of business.**

It is not every profit that is profit of the business or profit in the sense intended, having regard to the context. For instance, if a servant were employed in a business at a salary and a percentage of profits, he would not take a percentage upon the appreciated value of the business premises. Or, if directors are entitled to 3 per cent. of the net profits of the year, they will not take this percentage of the profit made by the sale of the undertaking and assets in winding-up. *Frames v. Bultfontein Co.*, (1891), 1 Ch. 140. F

(6) **Profits—Appreciated value of capital assets.**

It is quite consistent with this that the appreciated value of capital assets is a profit, divisible if the constitution of the company so allows. See *Buckley on Companies* (Consolidation Act), 1908, 657. G

(7) **Profit, ascertainment of—Matter of estimate and opinion.**

The ascertainment of profit is in every case necessarily matter of estimate and opinion. This is the case not only in determining what is properly chargeable to profit and loss, but also in saying what are the proper figures to be attributed to items occurring in profit and loss. The legitimate way is to take the facts as they actually stand, and, after forming an estimate of the assets as they actually exist, to draw a balance so as to ascertain the result in the shape of profit or loss. If this be done fairly and honestly, without any fraudulent intention

1.—“No dividend... profits arising from the business”—(Continued).

or purpose of deceiving any one, it does not render the dividend fraudulent that there was not cash in hand to pay it, or that the company were even obliged to borrow money for that purpose. And the fact that an estimated value was put upon assets which were then in jeopardy and were subsequently lost does not render the account delusive and fraudulent. *Stringer's case*, 4 Ch. D. 344; *Bond v. Barrow Steel Co.*, (1902), 1 Ch. 353. H

(8) Profit and loss account not prepared—Declaration of dividend—Effect.

(a) If a dividend be declared without proper investigation of the financial position of the company, and no profit and loss account be prepared, but only an account of receipts and payments, making no allowance for risks, the burden is on the directors to show that the dividend was properly declared, and in default a director will be ordered to refund the dividend he has received. *Rance's case*, 6 Ch. 104. I

(b) If directors pay dividends out of capital, they may be liable for the whole amount so misapplied. *National Funds Co.*, 10 Ch. D. 118; *Oxford Building Society*, 35 Ch. D. 502. J

(c) A shareholder, however, who has with knowledge received the dividend cannot individually, or suing on behalf of himself and others, enforce re-payment. *Towers v. African Tug*, (1904), 1 Ch. 558. K

(9) Revenue expenses chargeable to capital, paid out of.

Where expenses, properly chargeable to capital, have been paid out of revenue, the company are justified in recouping revenue account at a subsequent time out of capital. *Mills v. Northern Railway of Buenos Ayres Co.*, 5 Ch. 621. L

(10) Profits, payment of interest to share-holders, prior to realization of.

(a) The payment of interest to the share-holders, before any profits have been realized out of capital or borrowed moneys, even though made in pursuance of a resolution at a general meeting, is *ultra vires*, and has been restrained by injunction on a bill filed by a share-holder as being in effect a lessening of the capital to the prejudice of creditors. *Mac Dougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528. M

(b) But although the improper payment of a dividend will be restrained by injunction on an action brought by a share-holder in the company (*Hoole v. Great Western Railway Co.*, 3 Ch. 262) a mere simple contract creditor cannot sustain such a bill on the ground that the fund for payment of his debt is thereby diminished. *Mills v. Northern Railway of Buenos Ayres Co.*, 5 Ch. 621. N

(11) Debenture capital—Payment out of capital of dividends.

(a) It does not follow that because payment out of capital of dividends on share capital is illegal, that the same holds good of what is commonly called debenture capital. *Bloxam v. Metropolitan Railway Co.*, 3 Ch. 387 (350). O

(b) Debenture capital is not in fact capital at all in the proper sense of the word. It is available money raised by borrowing (*Ibid.*). P

(c) And the interest on capital, employed in the construction of works, and in the meantime unproductive, may under certain circumstances in fact form part of the capital employed in the work, and may be pro-

1.—“No dividend....profits arising from the business”.—(Concluded).

perly chargeable to capital account. It seems that this has been held with respect to preference shares. *Bardwell v. Sheffield Waterworks Co.*, 14 Eq. 517. Q

(12) Profits, capitalization of.

- (a) A company may if its constitution so allows capitalize profits instead of dividing them, and so as that they shall not thereafter be capable of division. Many cases under this head have arisen where it was necessary to determine the rights as between tenant for life and remainderman of settled shares. *Artisans' Corp.*, (1904), 1 Ch. 796. R
- (b) Profits which have not been capitalized retain the character of profits notwithstanding that they be carried to reserve (*Bridgewater Navigation Co.*, (1891), 1 Ch. 155; 2 Ch. 317;) and may in the liquidation of the company belong to the members according to their rights in profits as distinguished from their rights in capital and that notwithstanding there be a deficiency in capital (*Bishop v. Smyrna Railway*, 1895, 2 Ch. 265) if such deficiency has arisen from capital and not from revenue loss.

(74) The directors may, before recommending any dividend, set aside, out of the profits of the Company, such sum as they think proper as a reserved fund¹ to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the Company or any part thereof; and the directors may invest the sum so set apart as a reserved fund¹ upon such securities as they may select.

(Notes).

(1) Corresponding English Law.

The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied and pending such application may at the like discretion, either be employed in the business of the company or be invested in such investment (other than shares of the company) as the directors may from time to time think fit. Art. 99, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. S

(2) Frame of articles may be such as not to admit payment of dividend out of reserve fund.

The articles are sometimes framed as to prevent the application of the reserve fund to the payment of dividends. See *Eastern and Australian S.S. Co.*, (1893), W.N. 31=41 W.R. 379. T

(3) Profits available for dividend.

The word—in a memorandum may mean profits after setting aside as provided by such an article as the present. *Fisher v. Black and White & Co.*, (1901), 1 Ch. 174. U

1.—“*Reserved Fund*”

[See also 10 B. 415 under Art. 72, *supra*.]

(1) **Reserve fund, Provision for, in the Articles.**

(a) The articles of association almost invariably provide that a portion of the profits may be set aside, before any dividend is declared, to form a reserve fund. [See This Article.] Y

(b) Sometimes they provide that a fixed proportion shall be set aside, and often give special directions as to how the fund is to be invested. Gore-Browne and Jordan on Joint Stock Companies, Edn. 30, p. 292. W

(2) **Reserve Fund, Right to carry profits to, without special authority.**

A company may, however, without any special authority contained in its articles, carry profits to reserve, and either use the reserve in the business or invest it in such securities as the directors may think fit. *Burland v. Earle*, (1902), App. Ca. at. p. 95. X

(3) **Reserve Fund—Necessity for—Investment.**

It is very desirable that a reserve fund should be built up, a portion of the profits in each year not being distributed. The reserve fund may either be specially invested in stocks or funds, or shares of other companies, or it may be used in the general business of the Company. If so used, it will appear in the balance sheet on the debtor side, and the credit side will be increased by the assets which the fund has been used to purchase. Gore-Browne and Jordan on Joint-Stock Companies, Edn. 30, p. 292. Y

(4) ***Ibid*—Special portions—Dividend—Equalizing.**

The reserve fund may be divided into various special portions, and when very large profits have been made in one year, it is convenient to make a special reserve for equalising dividends, the intention being to spread the distribution of it over several years. Sums may be taken from the reserve fund to make up losses or to pay dividends, even if it consists of premium received on the issue of shares. *Hoare & Co.*, (1904), 2 Ch. 208. Z

(5) **Reserve Fund—Undivided profit.**

In fact, the reserve fund is undivided profit, and may be treated as profit at the disposal of the company, subject only to any restrictions which the Articles of Association may impose. Gore-Browne and Jordan on Joint-Stock Companies, Edn. 30, p. 293. A

(6) ***Ibid*—Division—Profits—Preference share-holders—Undivided profits in winding up merging in ordinary assets.**

(a) If a reserve fund comes to be divided, whether while the company is a going concern or in liquidation, it remains “profits,” and the members are entitled to share in it in accordance with their rights to the profits. Thus, if the Articles provide that the members shall be entitled to share in the profits in certain proportions, they will have the same rights in the distribution of the reserve fund. Consequently, if there is anything due to the preference shareholders in respect of past dividends their claim must be first satisfied. *Bishop v. Smyrna and Cassaba Railway*, (1895), 2 Ch. 265. B

I.—“Reserved Fund”.—(Continued).

- (b) But if the preference shareholders have received their preferential dividend in full, the reserve fund will belong exclusively to the ordinary shareholders. *Bridgewater Navigation Co.*, (1891), 1 Ch. 155, 2 Ch. 317. C
- (c) On the other hand, if their respective rights do not arise till the declaration of a dividend and none has been declared or till the profits have been made “available for dividend” by some act of the directors which has become impossible owing to the liquidation, it appears that in a winding up any undivided profits will merge in the ordinary assets. *Crichton Oil Co.*, (1901), 2 Ch. 184, (1902), 2 Ch. 86. D

(7) *Ibid*—Used in business—Loss on capital account—Apportionment.

- (a) It was held that if the reserve fund is used in the business of the Company, and a loss arises on capital account, it must be apportioned rateably between capital and reserve. *Hoare & Co.*, (1904), 2 Ch. 298. E
- (b) But the House of Lords has now held that capital may be reduced without proving that it is lost, and the above rule will no longer apply in cases of reduction of capital. *Poole v. National Bank of China*, (1907), App. Cas. 229. F

(8) *Ibid*—, sum taken from—Bonus to Share-holders.

If a sum is taken from the reserve fund and paid by way of bonus to the share-holders, the company is only concerned to see that the persons whose names are on the Register of Members at the time get the bonus. *Gore-Browne and Jordan on Joint-Stock Companies*, Edn. 30, p. 293. G

(9) *Ibid*—, Conversion of, into Capital—Increase of Capital—New shares—Impending danger.

Sometimes, with a view to converting the reserve fund into capital, the company resolves to divide it among the members and at the same time increase the capital. The new shares are offered rateably to the members, an amount equal to the reserve fund distributed being called up. This plan works well if the shares stand at a premium; but if they do not members, may be expected to accept the return of reserve fund and to refuse to take up the new shares. There is a danger also that upon subsequent investigation it may turn out that the reserve fund did not really represent profits, and in such a case the shares issued would not be fully paid. See *Eastern and Australian Steamship Co.*, (1893), 41 W. R. 373. H

(10) *Ibid*—Sums set aside to represent depreciation of stock.

Sums are often set aside to represent depreciation of plant and buildings, and to provide for debts proving bad. This is in the nature of a reserve fund; but it is more usual to write the depreciation off the book value of the plant and buildings, and to keep the reserve for bad debts out of the balance sheet. How far this is legitimate depends on the facts of each case. If done in good faith and to a reasonable extent, the Courts will not interfere, even at the instance of preference shareholders who get less than their full dividend. *Bond v. Barrow Haematite Co.*, (1902), 1 Ch. 358. H-1

•
1.—“Reserve Fund”—(Concluded).

(11) Reserve fund, secret.

Directors often desire to have a “secret reserve fund” on which they can draw in case of an unexpected loss without causing the discredit attaching to drawing upon the general reserve fund. A resolution for creating such a reserve and directing that the auditors should not disclose any particulars to the share-holders was held to be unobjectionable, as to the first part, but *ultra vires* so far as it forbade the auditors to disclose any matters. Gore-Browne and Jordan on Joint-Stock Companies, Edn., 30, p. 294. I-J

(75) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the Company on account of calls or otherwise.

(76) Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned¹; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the Company.

(Notes).

Corresponding English Law.

Cf. Art. 181, Table A, Sch. I, The English Companies (Consolidation) Act, (1908). K

1.—“Notice of....mentioned.”

See Arts. 95—97, *infra*. L

(77) No dividend shall bear interest¹ as against the Company.

(Notes).

Corresponding English Law.

This Article is word for word the same as Art. 102, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. M

1.—“Interest.”

Dividend only debt—Interest.

A dividend is a debt, and no interest is payable on a debt except by agreement. Gore-Brown and Jordan on Joint-Stock Companies, 30th Ed., p. 532. N

Accounts.

(78) The directors shall cause true accounts to be kept—
of the stock-in-trade of the Company;
of the sums of money received and expended by the Company,
and the matters in respect of which such receipt and expenditure take place; and
of the credits and liabilities of the Company.

The Books of account shall be kept at the registered office of the Company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the Company in general meeting, shall be open to the inspection¹ of the members during the hours of business.

(Notes).

[N.B.—See, also, notes under Ss. 74, 214, 215, 216, *supra*.]

Corresponding English Law.

Cf. Arts. 103, 104, 105, Table A, Sch. I, The English Companies (Consolidation) Act, 1909. O

I.—“The books of account... shall be open to the inspection.”

(1) Clause giving right to inspect ceases to apply when.

A clause giving a right to inspect the books ceases to apply when the company goes into voluntary liquidation (*Yorkshire Fibre Co.*, 9 Eq. 680) although if the winding-up be for reconstruction it may be otherwise. *Glamorganshire Banking Co. Morgan's case*, 28 Ch. D 620. P

(2) Clause giving right of inspection—Scope of.

A clause giving a right of inspection of “the books wherein the proceedings of the company are recorded” does not give a share-holder the right to inspect the book of minutes of the proceedings of the directors. In practice a company never allows the members to inspect the directors' minute book or its books of account unless a committee of inspection is appointed. *Reg. v. Mariquita Mining Co.*, 1 E. & E. 289. Q

(3) Right to inspect, director's documents with company's solicitor.

In the absence of any special provision a director has (but a mere member has not), a right to inspect documents held by the company's solicitor on its behalf. *Burn v. London and South Wales Coal Co.*, 1890, W.N. 209. R

(4) Inspection pending winding-up petition and after order made.

As to—see Notes to S. 200, *supra*. S

(79) Once at the least in every year¹ the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year made up to a date not more than three months before such meeting.

(Notes).

Corresponding English Law.

Once at least in every year the directors shall lay before the Company in general meeting a profit and loss account for the period since the preceding account or (in the case of the first account) since the incorporation of the Company, made up to a date not more than six months before such meeting. Art. 106, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. T

Cf. the italicized portions of this Article with Art. 79, Table A, Sch. I, Act VI of 1882.

I.—“Year.”

Every year—Meaning.

“Every year” means “calendar” year. *Gibson v. Barton*, (1875), L.R. 10 Q.B. 329; See, also, H at p. 230, *supra*. U

(80) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

(81) A balance-sheet¹ shall be made out in every year, and laid before the Company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

(Notes).

[See sections 74, 215, *supra*.]

Corresponding English Law.

A balance-sheet shall be made out in every year and laid before the company in general meeting *made up to a date not more than six months before such meeting*. The balance-sheet shall be accompanied by a *report of the directors* as to the state of the company's affairs, and the amount which they propose to carry to a reserve fund. Art. 107, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. Y

I.—“Balance-sheet.”

(1) Balance-sheet—What it shows.

The balance-sheet does not pretend to show absolutely the exact position of the company. Many matters are necessarily the subject of estimates, and frequently the balance-sheet shows that assets are included on some arbitrary basis (*e.g.*, “at cost”), and not at their selling value. In regard to an undisclosed reserve, *Buckely, J.* has said, “The result” (of omitting this item) “will be to show the financial position of the company to be not so good as in fact it is. If the balance-sheet is so worded as to show that there is an undisclosed asset whose existence makes the financial position better than that shown, such a balance sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probable

1.—“*Balance-sheet*”—(Concluded).

real value. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not and may not be better.” *Newton v. Birmingham Small Arms Co.*, (1906), 2 Ch. at p. 387. W

(2) *Ibid.*—Making a false, before winding-up.

See Y, Z, A, at pp. 532, 533, *supra*. X

(82) A printed copy of such balance-sheet¹ shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served.

(Notes).

Corresponding English Law.

A copy of the balance-sheet and report shall, seven days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder. Art. 108, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. Y

1.—“*Balance-sheet.*”(1) Provision for presentation of balance-sheet at half-yearly general meeting—
No such balance-sheet filed.

Where the articles provided for the presentation at every half-yearly general meeting of a balance-sheet and general summary of accounts which was to be binding and conclusive on the share-holders unless objected to before the next general meeting, and no such balance-sheet or general summary, but only a half-yearly report, was prepared, in which the affairs of the company were mis-stated, such reports were not binding on the share-holders. *Portsmouth Banking Co. Helby's and other cases* 2 Eq. 167. Z

(2) Balance-sheet—Director—Liability.

A director is not necessarily personally responsible for balance-sheets and reports stated to be issued “By order of the directors.” *Denham & Co.*, 25 Ch. D. 652. A

Audit.

(83) Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained, by one or more auditor or auditors.

(Note).

[See S. 74, *supra*].

Corresponding English Law.

Cf. Ss. 112, 113, Art. 109, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. B

(84) The first auditors shall be appointed by the directors; subsequent auditors shall be appointed by the Company in general meeting.

(85) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

(86) The auditors may be members of the Company, but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the Company, and no director or other officer of the company is eligible during his continuance in office.

(87) The election of auditors shall be made by the Company of their ordinary meeting in each year.

(88) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the Company in general meeting.

(89) Any auditors shall be re-eligible on his quitting office.

(90) If any casual vacancy occurs in the office of any auditor appointed by the Company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

(91) If no election of auditors is made in manner aforesaid, the Local Government may, on the application of not less than five members of the Company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the Company for his services.

(92) Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

(93) Every auditor shall have a list delivered to him of all books kept by the Company, and shall, at all reasonable times, have access to the books and accounts of the Company. He may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the Company.

(94) The auditors shall make a report to the members upon the balance-sheet and accounts, and in such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs, and, in case they have called for explanations or information from the directors, whether such

explanations or information have or has been given by the directors, and whether they or it have or has been satisfactory. Such report shall be read, together with the report or the directors at the ordinary meeting.

Notices.

(95) A notice ¹ may be served by the Company upon any member either personally or by sending it through the post in a letter addressed to such member at his registered place of abode.

(Notes).

Corresponding English Law.

Cf. The first paragraph of Art. 110, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. C

1.—“Notice.”

(1) Notice when deemed to served for ordinary purposes.

For the ordinary purposes of the business of the Company the notice is to be deemed to have been served even if in fact it never reached its destination: But the Article does not apply so as to affect the member with notice of a misrepresentation, which notice was in fact given by the document; if the document does not reach his hands. *London and Staffordshire Fire Co.*, 24 Ch. 149. D

(2) Notice by advertisement.

A notice given by advertisement is to be deemed to have been given at the time of the publication of the advertisement. *Mercantile Investment Co. v. International Co. of Mexico*, (1893), 1 Ch. 484, (n), 489, (n). E

(3) Notice before rectification of register.

In cases where the register is rectified, even retrospectively, a notice given before the order for rectification to the members then on the register, is, *semble*, sufficient. *Sussex Brick Co.*, (1904), 1 Ch. 598, 611. F

(4) Notice served in manner specified—Member dead.

A notice served on a member in the manner prescribed is effective notwithstanding that the member is dead, at all events if the Company has no knowledge of his death. (*James v. Buena Ventura Syndicate*, (1896), 1 Ch. 457); but under some article notice to such a member may not be required at all. *Allen v. Gold Reefs*, (1900), 1 Ch. 656, 670. G

(5) Company—Members—Notice of call—Notes sent by post to registered address—Death of member—Communication to the Company of his death—Company's knowledge of death.

Where a member in a Company has died, and his death has not been communicated to the Company, all notice which ought to be served upon him are duly served if they are sent addressed to his registered address whether they actually come into the hands of his executors and other representatives or not. *In re Agriculturist Cattle Insurance Co.*, L.R. 5 Ch. 725; *New Zealand Gold Extraction Co.*, (1894) 1 Q.B. 622; *Allen v. Gold Reefs of West Africa, Ltd.*, (1900) 1 Ch. 656, *F.*, 4 Bom. L.R. 215; 5 Bom. L.R. 225. H

(96) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice given shall be sufficient notice to all the holders of such share.

(Note).

Corresponding English Law.

Cf. Art. 112, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. I

(97) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and, in proving such service¹ it, shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post-office.

(Notes).

Corresponding English Law.

Cf. Paragraph 2, Art. 110, Table A, Sch. I, The English Companies (Consolidation) Act, 1908. J

1.—“Notice....such service.”

Press copy of letter inadmissible in evidence to prove communication.

- (a) Paragraph 97 of Sch. A of the Indian Companies Act, 1882, contemplates that proof should be given that notices sent through the post by companies which adopted that schedule were properly addressed and put into the post-office. 9 A. 366 (385). K
- (b) As there was no evidence in this case that either of the letters was properly addressed or put into the post-office the Court declined to draw, and did not draw, the inference that the letters were properly addressed or posted, and accordingly excluded the press-copy letters in question from the evidence in this case. (*Ibid.*) L
- (c) A letter to a proposer not correctly addressed could not, although posted, be said to have been “put in a course of transmission to him. 9 A. 366 (385). M

Dr.	Balance-sheet (a) of the	Company made up to	18	CR.
CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.		
I. CAPITAL.	Rs. A.	III. PROPERTY HELD BY THE COM-PANY.	Rs. A.	
1 The number of shares ...	SHOWING—			
2 The amount paid per share ...	The number of shares ...			
3 If any arrears of calls, the nature of the arrear, and the names of the defaulters.	The amount paid per share ...			
4 The particulars of any forfeited shares.	The nature of the arrear, and the names of the defaulters.			
	The particulars of any forfeited shares.			
	SHOWING—			
5 The amount of loans or mortgages or debenture-bonds ...	The amount of loans or mortgages or debenture-bonds ...			
6 The amount of debts owing by the Company—distinguishing—	The amount of debts owing by the Company—distinguishing—			
	(a) Debts for which acceptances have been given ...			
	(b) Debts to tradesmen for supplies of stock-in-trade or other articles ...			
	(c) Debts for law-expenses ...			
	(d) Debts for interest on debentures or other loans ...			
	(e) Unclaimed dividends ...			
	(f) Debts not enumerated above ...			
	SHOWING—			
	The amount set aside from profits to meet contingencies ...			
	SHOWING—			
	The disposable balance for payment of dividends, &c. ...			
	Claims against the Company not acknowledged as debts ...			
	Moneys for which the Company is contingently liable ...			
II. DEBTS AND LIABILITIES OF THE COM-PANY.		IV. D E B T S OWING TO THE COM-PANY.		

(a) See clauses 81 and 82 of the foregoing Table A.

TABLE B.

TABLE OF FEES to be paid to the Registrar of Joint Stock Companies by a Company having a capital divided into shares :—

	Rs. A. P.
For registration of a Company whose nominal capital does not exceed Rs. 20,000, a fee of	40 0 0
For registration of a Company whose nominal capital exceeds Rs. 20,000, the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—	
For every 10,000 rupees of nominal capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20 0 0
For every 10,000 rupees of nominal capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,000 rupees	5 0 0
For every 10,000 rupees of nominal capital, or part of 10,000 rupees, after the first 1,00,000 rupees	1 0 0
For registration of any increase of capital made after the first registration of the Company, the same fees per 10,000 rupees, or part of 10,000 rupees, as would have been payable if such increased capital had formed part of the original capital at the time of registration.	
Provided that no Company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 1,000 rupees, taking into account, in the case of fees payable on an increase of capital after registration, the fees paid on registration.	
For registration of any existing Company, except such Companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new Company.	
For registering any document hereby required or authorized to be registered, other than the memorandum of association	5 0 0
For making a record of any fact hereby authorized or required to be recorded by the Registrar of Companies, a fee of	5 0 0

TABLE C.

TABLE OF FEES to be paid to the Registrar of Joint Stock Companies by a Company not having a capital divided into shares :—

	Rs. A. P.
For registration of a Company whose number of members, as stated in the articles of association, does not exceed 20	40 0 0
For registration of a Company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	100 0 0
For registration of a Company whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.	
For registration of a Company in which the number of members is stated in the articles of association to be unlimited, a fee of	400 0 0
For registration of any increase on the number of members made after the registration of the Company, in respect of every 50 members, or less than 50 members, of such increase	5 0 0

Rs. A. P.

Provided that no one Company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the Company.

For registration of any existing Company, except such Companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new Company.

For registering any document hereby required or authorized to be registered, other than the memorandum of association 5 0 0

For making a record of any fact hereby authorized or required to be recorded by the Registrar of Companies, a fee of 5 0 0

FORM D.

FORM OF STATEMENT REFERRED TO IN PART III OF THE ACT.

* The capital of the Company is Rs. divided into shares of each.

The number of shares issued is . Calls to the amount of Rs.

per share have been made, under which the sum of Rs. has been received.

The liabilities of the Company on the first day of January (or July) were :—

Debts owing to sundry persons by the Company :

Under decree, Rs.

On mortgages or bonds, Rs.

On notes, bills, or hundis, Rs.

On other contracts, Rs.

On estimated liabilities, Rs.

The assets of the Company on that day were :—

Government securities [stating them], Rs.

Bills of exchange, hundis and promissory notes, Rs.

Cash at the bankers, Rs.

Other securities, Rs.

* If the Company has no capital divided into shares, the portion of the statement relating to capital and shares must be omitted.

SECOND SCHEDULE.

(SEE SECTION 95.)

FORM A.

Memorandum of association of a Company limited by shares.

1st—The name of the Company is "The Company, Limited."

2nd—The registered office of the Company will be situate in .

3rd—The objects for which the Company is established are " and the doing all such other things as are incidental or conducive to the attainment of the above objects."

4th—The liability of the members is limited.

5th—The capital of the Company is Rs. divided into shares of Rs. each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names :—

Names, addresses and descriptions of subscribers.	Number of shares taken by each subscriber.
1. A. B. of 2. C. D. " 3. E. F. " 4. G. H. " 5. I. J. " 6. K. L. " 7. M. N. "	
Total shares taken ...	

Dated the day of

Witness to the above signatures :

O.P. of

FORM B.

Memorandum and articles of association of a Company limited by guarantee, and not having a capital divided into shares.

Memorandum of Association.

1st—The name of the Company is "The Mutual Calcutta Marine Association, Limited."

2nd—The registered office of the Company will be situate in Calcutta.

3rd—The objects for which the Company is established are "the mutual insurance of ships belonging to members of the Company, and the doing all such other things as are incidental or conducive to the attainment of the above objects."

4th—Every member of the Company undertakes to contribute to the assets of the Company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the Company contracted before the time at which he ceases to be a member, and the costs, and expenses of winding-up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding Rs. 100.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

1. A. B. of
2. C. D. "
3. E. F. "
4. G. H. "
5. I. J. "
6. K. L. "
7. M. N. "

Dated the day of

Witness to the above signatures :

O.P. of

Articles of Association to accompany the preceding Memorandum of Association.

(1) The Company, for the purpose of registration, is declared to consist of five hundred members.

(2) The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of Members.

(3) Every person shall be deemed to have agreed to become a member of the Company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

(4) The first general meeting shall be held at such time, not being more than three months after the incorporation of the Company, and at such place, as the directors may determine.

(5) Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting; and, if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year at such place as may be determined by the directors.

(6) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(7) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary general meeting.

(8) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

(9) Upon the receipt of such requisition, the directors shall forthwith proceed to convene a general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists or any other five members may themselves convene a meeting.

Proceedings at General Meetings.

(10) Seven days' notice at the least, specifying the place, the day, and the hour of meeting, and, in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(11) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets, and the ordinary report of the directors.

(12) No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of such business. Such quorum shall be ascertained as follows, that is to say: if the members of the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty; with this limitation that no quorum shall in any case exceed thirty.

(13) If, within one hour from the time appointed for the meeting, a quorum of members is not present, the meeting, if convened upon the requisition of the members shall be dissolved. In any other case, it shall stand adjourned to the same day in the following week, at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

(14) The chairman (if any) of the directors shall preside as chairman at every general meeting of the Company.

(15) If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of such meeting.

(16) The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(17) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(18) If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs; and the result of such poll shall be deemed to be the resolution of the Company in general meeting.

Votes of Members.

(19) Every member shall have one vote and no more.

(20) If any member is a lunatic or idiot, he may vote by his committee or other legal curator; if any member is a minor, he may vote by his guardian or any one of his guardians if more than one.

(21) No member shall be entitled to vote at any meeting unless all moneys due from him to the Company have been paid.

(22) Votes may be given either personally or by proxies. A proxy shall be appointed in writing under the hand of the appointer, or, if such appointer is a corporation, under its common seal.

(23) No person shall be appointed a proxy who is not a member, and the instrument appointing him shall be deposited at the registered office of the Company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

(24) Any instrument appointing a proxy shall be in the following form :—

Company, Limited.
Company, Limited.

I, , of , being a member of the
hereby appoint , of , as my proxy, to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the Company to be held on the day of , and at any adjournment thereof [or at any meeting of the Company that may be held in the year].
As witness my hand, this day of . Signed by the said in the presence of .

Directors.

(25) The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

(26) Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors.

Powers of Directors.

(27) The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not hereby required to be exercised by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Election of Directors.

(28) The directors shall be elected annually by the Company in general meeting.

Business of Company.

(Here insert rules as to mode in which business of insurance is to be conducted).

Accounts.

(29) The accounts of the Company shall be audited by a committee of five members, to be called the audit-committee.

(30) The first audit-committee shall be nominated by the directors out of the body of members.

(31) Subsequent audit-committees shall be nominated by the members at the ordinary general meeting in each year.

(32) The audit-committee shall be supplied with a copy of the balance-sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto.

(33) The audit-committee shall have a list delivered to them of all books kept by the Company, and they shall at all reasonable times have access to the books and accounts of the Company.

They may, at the expense of the Company, employ accountants or other persons to assist them in investigating such accounts, and they may, in relation to such accounts, examine the directors or any other officer of the Company.

(34) The audit-committee shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet containing the particulars required by these regulations and properly draw up, so as to exhibit a true and correct view of the state of the Company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have or has been given by the directors, and whether they or it have or has been satisfactory; and such report shall be read together with the report of the directors at the ordinary meeting.

Notices.

(35) A notice may be served by the Company upon any member, either personally, or by sending it through the post in a letter addressed to such member at his registered place of abode.

(36) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and, in proving such service, it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

Winding-up.

(37) The Company shall be wound up voluntarily whenever an extraordinary resolution, as defined by The Indian Companies Act, 1882, is passed, requiring the Company to be wound up voluntarily.

Names, Addresses and Descriptions of Subscribers.

1. A. B. of	Merchant.
2. C. D. of	"
3. E. F. of	"
4. G. H. of	"
5. I. J. of	"
6. K. L. of	"
7. M. N. of	"

Dated the day of 18.

Witness to the above signatures :

O. P. of

FORM C.

Memorandum and articles of association of a Company limited by guarantee, and having a capital divided into shares.

Memorandum of Association.

1st—The name of the Company is "The Hotel Company, Limited."

2nd—The registered office of the Company will be situate in.

3rd—The objects for which the Company is established are "the facilitating travelling in by providing hotels and conveyances by sea and by land for the

accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above objects."

4th—Every member of the Company undertakes to contribute to the assets of the Company, in the event of the same being wound up during the time that he is a member or within one year afterwards, for payment of the debts and liabilities of the Company contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding up the same, and for the adjustment of the rights of the contributors amongst themselves, such amounts as may be required not exceeding Rs. 200.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

1. A. B. of
2. C. D. of
3. E. F. of
4. G. H. of
5. I. J. of
6. K. L. of
7. M. N. of

Dated the day of 18 .

Witness to the above signatures :

O. P. of

Articles of Association to accompany the preceding Memorandum of Association.

1. The capital of the Company shall consist of five lakhs of rupees divided into five thousand shares of one hundred rupees each.

2. The directors may, with the sanction of the Company in general meeting, reduce the amount of shares.

3. The directors may, with the sanction of the Company in general meeting, cancel any shares belonging to the Company.

4. All the articles of Table A shall be deemed to be incorporated with these articles, and to apply to the Company.

We, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the Company set opposite our respective names.

(Names, addresses, and descriptions of subscribers.	Number of shares taken by each subscriber.
<ol style="list-style-type: none"> 1. A. B. of 2. C. D. of 3. E. F. of 4. G. H. of 5. I. J. of 6. K. L. of 7. M. N. of 	
Total shares taken ...	

Dated the day of 18 .

Witness to the above signatures :

O. P. of

FORM D.

Memorandum and articles of association of an unlimited Company having a capital divided into shares.

Memorandum of Association.

1st—The name of the Company is "The Patent Company."

2nd—The registered office of the Company will be situate in.

3rd—The objects for which the Company is established are “the working of a patent method of _____, of which method O. P. of _____, is the sole patentee.”

We, the several persons whose names are subscribed, are desirous of being formed into a Company in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

1. A. B. of
2. C. D. of
3. E. F. of
4. G. H. of
5. I. J. of
6. K. L. of
7. M. N. of

Dated the _____ day of _____ 18 ____

Witness to the above signatures :

Q. R. of

Articles of Association to accompany the preceding Memorandum of Association.

Capital of the Company.

The capital of the Company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.

Application of Table A.

All the articles of Table A shall be deemed to be incorporated with these articles, and to apply to the Company.

We, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the Company set opposite our respective names.

Names, addresses and descriptions of subscribers.	Number of shares taken by subscribers.
1. A. B. of	
2. C. D. of	
3. E. F. of	
4. G. H. of	
5. I. J. of	
6. K. L. of	
7. M. N. of	
Total shares taken ...	

Dated the _____ day of _____ 18 ____

Witness to the above signatures :

Q. R. of

FORM E.

As required by the second part of the foregoing Act.

Summary of capital and shares of the _____ Company made up to the _____ day of _____
Nominal capital Rs. _____, divided into _____ shares of Rs. _____
each.

Number of shares taken up to the _____ day of _____

There has been called up on each share Rs. _____

Total amount of calls received, Rs. _____

Total amount of calls unpaid Rs. _____

List of persons holding shares in the _____ Company on the _____ day of _____
and of persons who have held shares therein at any time during the year
immediately preceding the said _____ day of _____ showing their names and addresses,
and an account of the shares so held.

APPENDIX I.

(Table B in Schedule to Act XIX of 1857.)*

REGULATIONS FOR MANAGEMENT OF THE COMPANY.

Shares.

1. No person shall be deemed to have accepted any share in the Company unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to time directs.

2. The Company may from time to time make such calls upon the shareholders, in respect of all moneys unpaid on their shares, as they think fit, provided that twenty-one days' notice at least is given of each call; and each shareholder shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the Company.

3. A call shall be deemed to have been made at the time when the resolution authorising such call was passed.

4. If, before or on the day appointed for payment, any shareholder does not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate of 5 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

5. The Company may, if they think fit, receive, from any of the shareholders willing to advance the same, all or any part of the moneys due upon their respective shares beyond the sums actually called for, and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the shareholder paying such sum in advance and the Company agree upon.

6. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

7. The Company may decline to register any transfer of shares made by a shareholder who is indebted to them.

8. Every shareholder shall, on payment of such sum not exceeding eight annas as the Company may prescribe, be entitled to a certificate, under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.

9. If such certificate is worn out or lost, it may be renewed on payment of such sum, not exceeding eight annas, as the Company may prescribe.

10. The transfer-books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

11. The executors or administrators or representatives of a deceased shareholder shall be the only persons recognized by the Company as having any title to his share.

12. Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female share-holder or in any way other than by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the Company.

* See S. 3 (c) of the Indian Companies Act, 1882 (VI of 1882), *supra*. The Table is re-produced here as an appendix to Act VI of 1882 for convenience of reference.

13. Any person who has become entitled to a share in any way other than by transfer may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share.

14. The person so becoming entitled shall testify such election by executing to his nominee a transfer of such share.

15. The instrument of transfer shall be presented to the Company accompanied with such evidence as they may require to prove the title of the transferor, and thereupon the Company shall register the transferee as a shareholder.

Forfeiture of Shares.

16. If any shareholder fails to pay any call due on the appointed day, the Company may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with any interest that may have accrued by reason of such non-payment.

17. The notice shall name a further date, and a place or places, being a place or places at which calls of the Company are usually made payable, on and at which such call is to be paid : it shall also state that, in the event of non-payment at the time and place appointed, the shares in respect of which such call was made will be liable to be forfeited.

18. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect.

19. Any shares so forfeited shall be deemed to be the property of the Company, and may be disposed of in such manner as the Company thinks fit.

20. Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

Increase in Capital.

21. The Company may, with the sanction of the Company previously given in general meeting, increase its capital.

22. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital.

General Meetings.

23. The first general meeting shall be held at such time, not being more than twelve months after the incorporation of the Company, and at such place as the directors may determine.

24. Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting : and if no other time or place is prescribed, a general meeting shall be held on the first [Monday in February] * in every year, at such place as may be determined by the directors.

25. The above-mentioned general meetings shall be called ordinary meetings : all other general meetings shall be called extraordinary.

26. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any number of shareholders holding in the aggregate not less than one-fifth part of the shares of the Company convene an extraordinary general meeting.

* The bracketed portion read originally as follows :—"day of."

27. Any requisition so made by the shareholders shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

28. Upon the receipt of such requisition, the directors shall forthwith proceed to convene a general meeting; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other shareholders holding the required number of shares, may themselves convene a meeting.

29. Seven days' notice at the least, specifying the place, the time, the hour of meeting, and the purpose for which any general meeting is to be held, shall be given by advertisement, or in such other manner (if any) as may be prescribed by the Company.

30. Any shareholder may, on giving not less than three days' previous notice, submit any resolution to a meeting beyond the matters contained in the notice given of such meeting.

31. The notice required of a shareholder shall be given by leaving a copy of the resolution at the registered office of the Company.

32. No business shall be transacted at any meeting, except the declaration of a dividend, unless a quorum of shareholders is present at the commencement of such business; and such quorum shall be ascertained as follows (that is to say): if the shareholders belonging to the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional shareholders up to fifty, and one for every ten additional shareholders after fifty, with this limitation, that it shall not be necessary for any quorum in any case to exceed forty.

33. If within one hour from the time appointed for the meeting the required number of shareholders is not present, the meeting, if convened upon the requisition of the shareholders, shall be dissolved: in any other case it shall stand adjourned to the following day at the same time and place; and if at such adjourned meeting the required number of shareholders is not present, it shall be adjourned *sine die*.

34. The chairman (if any) of the Board of Directors shall preside as chairman at every meeting of the Company.

35. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the shareholders present shall choose some one of their number to be chairman of such meeting.

36. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

37. At any general meeting, unless a poll is demanded by at least five shareholders, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

38. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs; and the result of such poll shall be deemed to be the resolution of the Company in general meeting.

Votes of Shareholders.

39. Every shareholder shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares.

40. If any shareholder is a lunatic or idiot, he may vote by his committee; and if any shareholder is a minor, he may vote by his guardian, or any one of his guardians if more than one.

41. If more persons than one are jointly entitled to a share or shares, the person whose name stands first in the register of shareholders as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

42. No shareholder shall be entitled to vote at any meeting unless all calls due from him have been paid, nor until he shall have been possessed of his shares three calendar months, unless such shares shall have been acquired or shall have come by bequest, or by marriage, or by succession to an intestate's estate, or by any deed of settlement after the death of any person who shall have been entitled for life to the dividends of such shares.

43. Votes may be given either personally or by proxies; a proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under their common seal.

44. No person shall be appointed a proxy who is not a shareholder, and the instrument appointing him shall be deposited at the registered office of the Company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of one month from the date of its execution.

Directors.

45. The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

46. Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this Act be deemed to be directors.

Powers of Directors.

47. The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of association (if any) declared to be exercisable by the Company in general meeting subject nevertheless to any regulations of the articles of association, to the provisions of this Act, and to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company in general meeting but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Disqualification of Directors.

48. The Office of director shall be vacated

if he holds any other office or place of profit under the Company;

if he becomes bankrupt or insolvent;

if he is concerned in or participates in the profits of any contract with the Company;

if he participates in the profits of any work done for the Company.

But the above rules shall be subject to the following exceptions:—that no director shall vacate his office by reason of his being a share-holder in any incorporated Company which has entered into contracts with or done any work for the Company of which he is director; nevertheless he shall not vote in respect of such contract or work; and, if he does so vote, his vote shall not be counted, and he shall incur a penalty not exceeding five hundred rupees.

Rotation of Directors.

49. At the first ordinary meeting after the incorporation of the Company, the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being or, if their number is not a multiple of three, then the number nearest to one-third shall retire from office.

50. The one-third or other nearest number to retire during the first and second years ensuing the incorporation of the Company shall, unless the directors agree among themselves, be determined by ballot; in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

51. A retiring director shall be re-eligible.

52. The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

53. If at any meeting at which an election of directors ought to take place no such election is made, the meeting shall stand adjourned till the next day, at the same time and place; and if at such adjourned meeting no election takes place, the former directors shall continue to act until new directors are appointed at the first ordinary meeting of the following year.

54. The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

55. Any casual vacancy occurring in the Board of Directors may be filled up by the directors; but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

Proceedings of Directors.

56. The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business: questions arising at any meeting shall be decided by a majority of votes: in case of an equality of votes, the chairman, in addition to his original vote, shall have a casting vote: a director may at any time summon a meeting of the directors.

57. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

58. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit: any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

59. A committee may elect a chairman of their meetings: if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

60. A committee may meet and adjourn as they think proper; questions at any meeting shall be determined by a majority of votes of the members present; and in case of an equal division of votes, the chairman shall have a casting vote.

61. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

62. The director shall cause minutes to be made in books provided for the purpose—

- (1) of all appointments of officers made by the directors;
- (2) of the names of the directors present at each meeting of directors and committees of directors;
- (3) of all orders made by the directors and committees of directors; and

- (4) of all resolutions and proceedings of meetings of the Company, and of the directors and committees of directors.

And any such minute as aforesaid, if signed by any person purporting to be the chairman of any meeting of directors, or committee of directors shall be receivable in evidence without any further proof.

63. The Company, in general meeting, may, by a special resolution remove any director before the expiration of his period of office and appoint another qualified person in his stead; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he has not been removed.

Dividends.

64. The directors may, with the sanction of the Company in general meeting declare a dividend to be paid to the shareholders in proportion to their shares.

65. The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the Company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they, with the sanction of the Company, may select.

66. The directors may deduct from the dividends payable to any shareholders all such sums of money as may be due from him to the Company on account of calls or otherwise.

67. Notice of any dividend that may have been declared shall be given to each shareholder, or sent by post or otherwise to his registered place of abode; and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the Company.

68. No dividend shall bear interest as against the Company.

Accounts.

69. Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

70. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters; every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

71. A balance-sheet shall be made out in every year, and laid before the general meeting of the Company; and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

72. A printed copy of such balance-sheet shall, seven days previously to such meeting, be delivered at or sent by post to the registered address of every shareholder.

Audit.

73. The accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors to be elected by the Company in general meeting.

74. If not more than one auditor is appointed, all the provisions herein contained relating to auditors shall apply to him.

75. The auditors need not be shareholders in the Company; no person is eligible as an auditor who is interested otherwise than as a shareholder in any transaction of the Company; and no director or other officer of the Company is eligible during his continuance in office. •

76. The election of auditors shall be made by the Company at their ordinary meeting, or, if there are more than one, at their first ordinary meeting in each year.

77. The remuneration of the auditors shall be fixed by the Company at the time of their election.

78. Any auditor shall be re-eligible on his quitting office.

79. If any casual vacancy occurs in the office of auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

80. If no election of auditors is made in manner aforesaid, the Local Government may, on the application of one-fifth in number of the shareholders of the Company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the Company for his services.

81. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

82. Every auditor shall have a list delivered to him of all books kept by the Company, and he shall at all reasonable times have access to the books and accounts of the Company; he may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the Company.

83. The auditors shall make a report to the shareholders upon the balance-sheet and accounts; and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs; and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

84. Notices requiring to be served by the Company upon the shareholders may be served either personally, or by leaving the same, or sending them through the post in a letter addressed to the shareholders, at their registered places of abode.

85. All notices directed to be given to the shareholders shall with respect to any share to which persons are jointly entitled be given to whichever of the said persons is named first in the register of shareholders; and notice so given shall be sufficient notice to all the proprietors of such share.

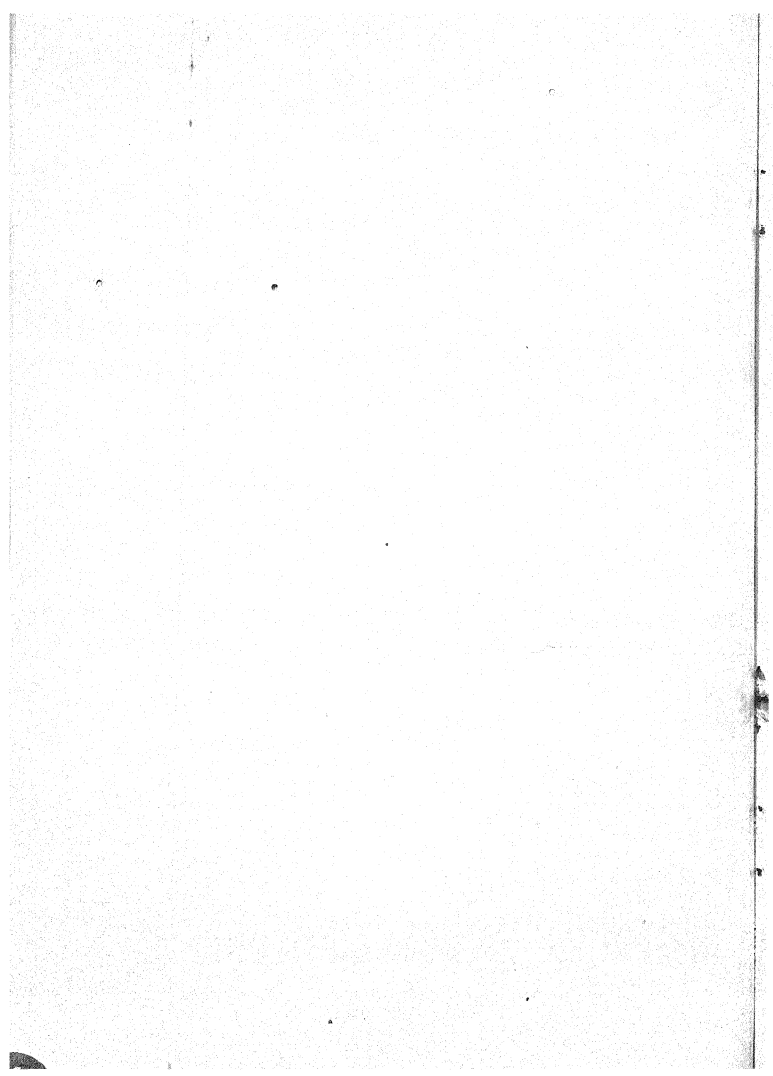
FORM OF BALANCE-SHEET REFERRED TO IN TABLE B.
Balance-Sheet of the* *Company made up to*

Dr.

Cr.

CAPITAL AND LIABILITIES.		PROPERTY AND ASSETS.	
I.—CAPITAL.	RS. A.P.	III.—PROPERTY HELD BY THE COMPANY.	RS. A.P. Rs. A.P.
SHOWING—		SHOWING—	
1 The total amount received from the share-holders; showing also—		4 Immoveable property, distinguishing—	
(a) The number of shares ...		(a) Land (describing tenure) ...	
(b) The amount paid per share ...		(b) Buildings ...	
(c) If any arrears of calls, the nature of the arrear, and the names of the defaulters ...		5 Moveable property, distinguishing—	
(Any arrears due from any Director or officer of the Company to be separately stated.)		(c) Stock-in-trade ...	
(d) The particulars of any forfeited shares ...		(d) Plant ...	
SHOWING—		(The cost to be stated with deduction for deterioration in value as charged to the Reserve Fund or Profit and Loss.)	
II.—DEBTS AND LIABILITIES OF THE COMPANY.		IV.—DEBTS OWING TO THE COMPANY.	
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THE INDIAN COMPANIES ACT, 1882.

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THE
COMPANIES BRANCH REGISTERS
ACT, 1900

(ACT IV OF 1900) •

(WITH THE CASE-LAW THEREON)

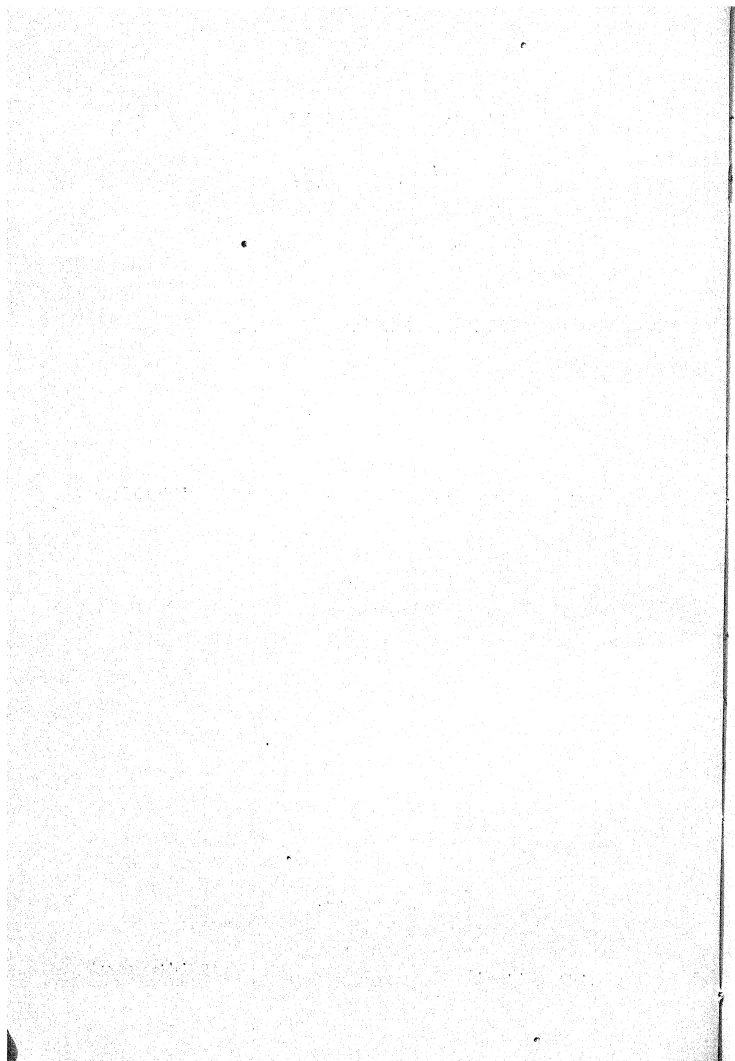
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THE COMPANIES BRANCH REGISTERS ACT, 1900.

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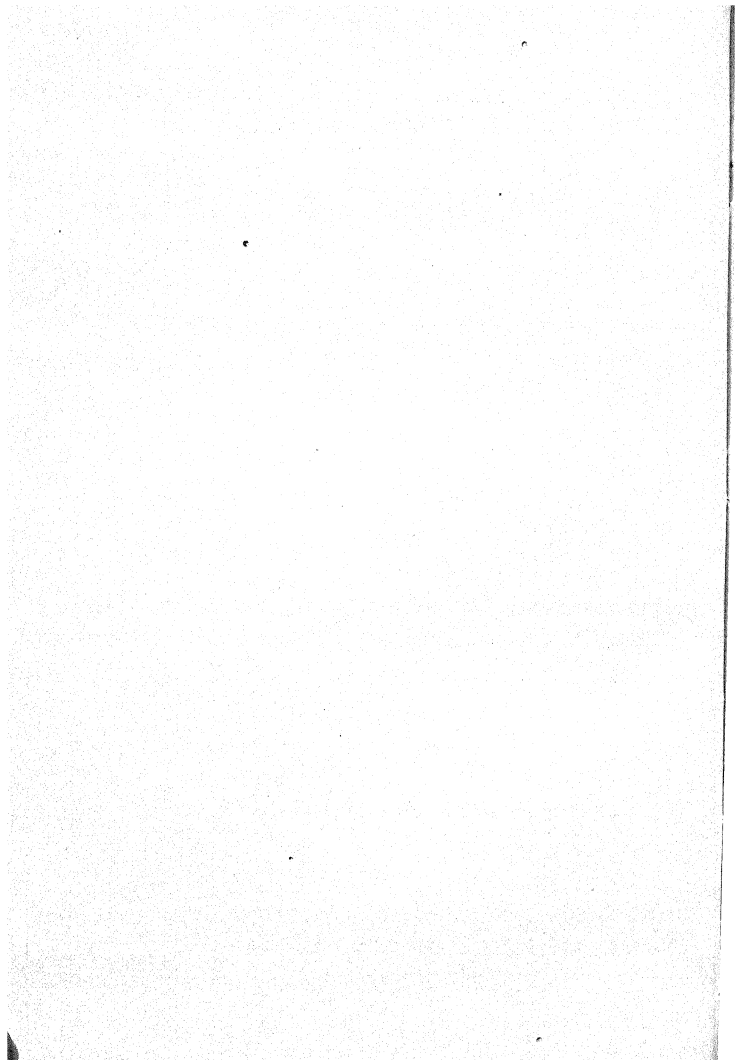
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COMPANIES (BRANCH REGISTERS) ACT.

(ACT IV OF 1900)¹.

[PASSED ON THE 16TH FEBRUARY, 1900.]

An Act to authorize certain Companies registered under the Indian Companies Act, 1882, to keep branch registers of their members in the United Kingdom.

WHEREAS it is expedient to authorize certain Companies registered under the Indian Companies Act, 1882, to keep branch registers VI of 1882. of their members in the United Kingdom : It is hereby enacted as follows :—

(Notes).

1.—“Act IV of 1900.”

(1) Statement of Objects and Reasons.

For ———, see Gazette of India, (1899), Pt. V, p. 74. A

(2) Report of the Select Committee.

For ———, see Gazette of India, (1900), p. 37. B

(3) Proceedings in Council.

For ———, see Gazette of India, (1900), Pt. VI, p. 185. *Ibid*, pp. 10 & 40. C

Short title, extent and commencement. 1. (1) This Act may be called the Indian Companies (Branch Registers) Act, 1900 ;

(2) It extends to the whole of British India ; and

(3) It shall come into force at once.

Definitions. . In this Act, unless there is anything repugnant in the subject or context,—

(a) the expression “Company¹” means a Company registered under the Indian Companies Act, 1882, having its capital divided VI of 1882. into shares ; and

(b) the expression “shares” includes stock².

(Notes).

1.—“Company.”

What is a Company.

- (a) The English Companies (Consolidation) Act, 1903, (*Cf.* Act VI of 1882), provides that ‘in this Act, unless the context otherwise requires’ the expression ‘Company’ means ‘a Company formed and registered under this Act, or an existing Company’ and the expression ‘existing Company’ means a Company formed and registered under the Joint-Stock Companies Act, or under the Companies Act, 1862. 8 M.L.T. 101. D

1.—“Company”—(Continued).

- (b) If it is difficult to define accurately a corporation, it is almost impossible to give a clear and correct definition of a Company. (*Ibid*). E
- (c) A very learned author says that a Company which is neither a corporation nor a partnership is a thing unknown to the Common Law of England; [Lindley on Companies, 6th Ed., p. 2, citing *McIntyre v. Connell* (1 Sim.N.S. 233)] but he adds that within the last century associations unknown to the common law have struggled into existence and become legal, and that they are commonly called Companies or more accurately Joint-Stock Companies. (*Ibid*), 102. F
- (d) The nearest approach to an English Judicial definition of a Company is to be found in *Smith v. Anderson* [15 Ch. D. 247 (261), decided by the Court of Appeal in 1880]. (*Ibid*). G
- (e) Lord Lindley boldly defines a Company as meaning ‘an association of many persons who contribute money or money’s worth to a common stock and employ it for some common purpose’ (Lindley on Companies, 6th Ed., p. 1.) (*Ibid*). H
- (f) ‘A Company which is neither incorporated nor privileged by the Crown or the Legislature is substantially a partnership; and although the transferability of its shares considerably modifies the application to it of the ordinary law of partnership, still the Company, like an ordinary firm, is not in a legal point of view distinguishable from the members composing it.’ (*Ibid*). I
- (g) Later on (Lindley on Companies, 6th Ed., p. 7) under the head of ‘Different kinds of Companies,’ he divides, not companies, but associations of persons having gain for their object, into several classes, one of which is partnership in the proper sense of the word. (*Ibid*), 103. J
- (h) In a recent case [*In re Stanley Tennant v. Stanley*, (1906) 1 Ch. 131, 134] Buckley, J., said :—“The word Company has no strictly technical meaning. It involves, I think, two ideas—namely, first, that the association is of persons so numerous as not to be aptly described as a firm; and secondly, that the consent of all other members is not required to the transfer of a member’s interest. It may . . . include an incorporated company.” (*Ibid*). K
- (i) According to an American authority this definition or statement is equally applicable in the United States. [See Machen’s Modern Law of Corporations (1908), S. 30.] (*Ibid*). L
- (j) The same author says :—“In America we speak of any association of individuals incorporated or unincorporated, as a Company, and we recognize that our ordinary Corporations are Companies; and indeed the word “Company” has been thought to import a Corporation, although a large number of American cases supported by legal reasoning as well as by literary and popular usage, hold that the word is equally applicable to some unincorporated associations.” (*Ibid*). M
- (k) In the face of all this learning it may be rash to attempt a definition of a Company; and the following is given with some hesitation. (*Ibid*). N
- (l) A Company is an association of two or more individuals. [Apparently, however, one person may be a Company if carrying on assurance business. See *Assurance Companies Act*, 1909 (9 Edw. VII, C. 49),

1.—“Company”—(Concluded).

S. 1] united for one or more common objects, which, whether incorporated or unincorporated, is (i) in the Act or Charter by or under which it is constituted, called a ‘Company’ (see Stroud’s Judicial Dictionary, 2nd Ed., title Company) or (ii), if it is not so constituted and called, is not an ordinary partnership, or a municipal or non-trading corporation, or a society constituted by or under a statute. See *Smith v. City of Jonesville*, [52 Wisc. 680; 9 N.W. 789, cited in Machen’s Modern Law of Corporations, S. 30; *Great Northern Railway v. Coal Co-operative Society* (1896), 1 Ch. 187; *Clark v. Balm, Hill & Co.*, (1908) 1 K.B. 667]; but an association whose members may transfer their interests and liabilities in or in respect of the concern without the consent of all the other members. (*Ibid*). 0

2.—“Shares include stock.”

(1) Stock and shares compared.

(a) “Shares are not necessarily paid up. They may exist as either paid up or not paid-up shares and they are not necessarily converted into stock when they are paid up. But stock can only exist in the paid-up state.” Per Lord Hatherley in *Morrice v. Aylmer*, (1875) 7 H.L. 717. P

(b) “Shares in a Company, as shares, cannot be bought in small fractions of any amount; but the consolidated stock of a Company can be bought just in the same way as the stock of the public debt can be bought, split up into as many portions as you like and sub-divided into as small fractions as you please.” (*Ibid*). Q

N.B.—But “independently of that, it possesses all the qualities of shares. It is in fact simply a set of shares put together in a bundle.” (*Ibid*).

(2) Incidents common to stocks and shares.

(a) “Stock is ordinarily transferable in the same manner as shares, but sometimes a minimum amount of transferable stock is fixed.” Evans & Cooper, p. 54. R

(b) “Stock-holders have usually the same right as regards dividends and voting as share-holders.” (*Ibid*). S

(c) “Preference and other rights in respect of shares are not affected by their conversion into stock.” (*Ibid*). T

(d) “Warrants to bearer may be issued in respect of stock.” (*Ibid*). U

3. (1) Any Company may, if authorised so to do by its regulations as originally framed or as altered by special resolution¹, cause to be kept in the United Kingdom a branch register or registers² of members.

Power to keep
branch registers in
the United Kingdom.

(2) The Company shall give to the Registrar of Joint-Stock Companies notice of the situation of the office where any such branch register (hereinafter called a “British register”) is kept, and any change therein, and of the discontinuance of any such office in the event of the same being discontinued, and the Registrar shall record such notice.

(3) A British register shall, as regards the particulars entered therein, be deemed to be a part of the Company's register of members kept under the Indian Companies Act, 1882, and shall be *prima facie* evidence³ of all particulars entered therein. Every such branch register shall be kept in the manner provided by sec. 47⁴ of the said Act.

(4) The Company shall transmit to its registered office in India a copy of every entry in its British register or registers as soon as may be after such entry is made, and shall cause to be kept at such office, duly entered up from time to time, a duplicate or duplicates or its British register or registers. The provisions of section 55 and section 60 of the Indian Companies Act, 1882, shall apply to every such duplicate, and every such duplicate shall, for the purposes of the said Act, be deemed to be part of the register of members of the Company.

(5) Subject to the provisions of this Act with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the Indian register, and no transaction with respect to any shares registered in a British register shall, during the continuance of the registration of such shares in such British register, be registered in any other register.

(6) The Company may discontinue any British register, and thereupon all entries in that register shall be transferred to some other British register kept by the Company in the United Kingdom, or to the register of members kept at the registered office of the Company in India.

(Notes).

1.—“*Special resolution.*”

Definition of “special resolution.”

“A resolution passed by a Company under this Act (VI of 1882) shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the Company for the time being entitled, according to the regulations of the Company, to vote, as may be present in person or by proxy (in cases where by the regulations of the Company proxies are allowed) at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled according to the regulations of the Company, to vote, as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month, from the date of the meeting at which such resolution was first passed.

1.—“Special resolution”—(Concluded).

At any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same.

Notice of any meeting shall, for the purposes of this section be deemed to be duly given and the meeting to be duly held whenever such notice is given and meeting held in manner prescribed by the regulations of the Company. [S. 77 of the Indian Companies Act (VI of 1882).] W

2.—“Branch register or registers.”

Power for Company to keep branch register.

- (a) Under the English law, a Company having a share capital, whose objects comprise the transaction of business in a Colony may, if so authorized by its articles, cause to be kept in any Colony in which it transacts business, a branch register of members resident in the Colony. [See S. 34 (1) of the English Companies (Consolidation) Act.] X

N.B.—The term Colony in the section includes British India.

- (b) The present section seems to contain similar provision. In *Sand's* case, 32 L.T. 299, it was held that a Company having Foreign and English share-holders could keep two registers—one at home and another abroad. But Buckley questions the correctness of this view. See Buckley, 9th Ed., pp. 71, 72. Y

3.—“Prima facie” evidence.”

(1) Register, evidentiary value of.

- (a) The register of members is only *prima facie* evidence of the matters directed or authorized by this Act to be inserted therein. Even in proceedings where the register cannot be rectified, evidence may be received to prove that the entries in it are false. See S. 60, Act VI of 1882; see, also, 9 W. R. 539; *Briton Medical Association*, 39 Ch. D. 61. Z
- (b) It is open to a person whose name is on the register, or omitted from it, to show that he ought not or ought to have been registered. 9 W. R. 539; see, also, *Cardmarthen Rail Co. v. Wright*, (1858) 1 F. & F. 282; *Portal v. Emmens*, (1876) 1 C. P. D. 201, affirmed in 1 C. P. D. 664, C. A.; *Hallmark's* case, (1878) 9 Ch. D. 329, C. A. A
- (c) Inaccuracies or omissions, in the register do not necessarily prevent it from being adduced in evidence. *Wills v. Murray*, (1850) 4 Ex. 843; *Bain v. Whitehaven and Furness Junction Rail Co.*, (1850) 3 H.L. case 1; *Southampton Dock Co. v. Richards*, (1840) 1 Man. & G. 448; *London and Brighton Rail Co. v. Fairclough*, (1841) 2 Man. & G. 674. B

(2) Entries in the register may estop the Company.

A person who obtains a transfer of shares, is, unless he has notice to the contrary, entitled to assume the correctness of the entries in the register, and share certificate as to the amount paid-up on the shares purchased by him and cannot be made liable for, such amount though, as a matter of fact, it has not been paid. *Nicoll's* case, *Barlinsshaw v. Nicolls*, 7 Ch. D. 538=3 A. C. 1004, S. C. 29; *Spargo's* case, 8 Ch. 407, 410; and see *Guest v. Worcester Railway Co.*, 4 C. P. 9, cited in Buckley, 9th Ed., p. 72. C

3.—“*Prima facie* evidence”—(Concluded).

(3) Register to be evidence.

The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein. [S. 60 of the Indian Companies Act, (VI of 1882).] D

(4) Register of members—*Prima facie* evidence.

(a) The register of members is *prima facie* evidence of everything that constitutes membership and the *onus* lies on the person who denies that he is a member to prove that he is not a member. 9 A. 366. E

(b) If a person, who is benefited by the *prima facie* evidence afforded by the register, does not stand upon such evidence until it is rebutted by the evidence adduced by the opposite party, but goes further and produces oral evidence [in support of the statements in the register, he does so at his own risk, for, the oral evidence may throw discredit on the register and displace the presumption which the register affords. 9 A. 366. F

(c) As the register is only *prima facie* evidence of the matters contained therein, it may, even in proceedings in which the register cannot be rectified, be proved that the entries in it are incorrect. Thus, though a Magistrate cannot order the rectification of the register of members, he is not thereby precluded, in proceedings taken before him against a Company or the Directors of a Company for contravening the provisions of S. 47, Act VI of 1882, from receiving evidence of facts showing that the entries in it are incorrect. *Briton Medical Association*, 39 Ch. D. 61. G

N.B.—For the particulars required to be entered in the register of members, see S. 47 Act VI of 1882.

4.—“*Every such branch register....section 47.*”

(1) Register may consist of several books.

The information required by S. 47, Companies Act, 1882, need not be contained in a single book. It may be entered in different books, in which case all the books will, together, constitute the register. *Weikersheim's* case, 8 Ch. 831, 836. See, also, *Inglis v. Great Northern Railway Co.*, 1 Macq. 112 H. L. H

(2) Register to be kept properly.

It is the duty of the Company to keep the register properly. *Per Westrapp, J.* in 3 B.H.C.R. (O.C.J.) 135. I

(3) Register not invalidated by slight irregularities.

(a) A register which substantially contains the information required by the Act is not invalidated by unimportant omission and deviations. 3 B.H.C.R. (O.C.J.) 106. J

(b) A book or document intended to be a register may be admitted in evidence as such, although the requirements of the Act as to how it should be kept, have not been regularly complied with. *Ex parte Cammell*, (1894) 2 Ch. 392, C.A., cited in Halsbury's Laws of England, Vol. V, p. 148. K

4.—“Every such branch register....section 47 ”—(Concluded).

(c) Thus, allotment sheets containing the names and addresses of the applicants for shares, the number of shares allotted to each, together with the dates of allotment, are sometimes treated as the register, until the formal book is prepared. *E.P. Cammell*, (1894) 1 Ch. 528=2 Ch. 292. See, also, *Nicolas and Lawrence*, 3rd Ed., p. 91. L

N.B.—But rough memoranda or sheets of paper intended as materials from which a register might be prepared are not a register. (*Ibid.*)

(4) Commencement of register.

The register must commence from the date of the registration of the Company and shall be kept at its registered office. M

(5) Lien, not to be entered in the register.

The Company must not enter in the register a statement that it has a lien on the shares of a member. *Re Key (W.) & Son, Ltd.*, (1902) 1 Ch. 467. N

N.B.—The Company cannot insist on putting on the register anything except what is required by the Act to be inserted therein. *Re Saunders*, [*T. & H. & Co.*, (1908) 1 Ch. 415] cited in Halsbury's Laws of England, Vol. V, p. 149. O

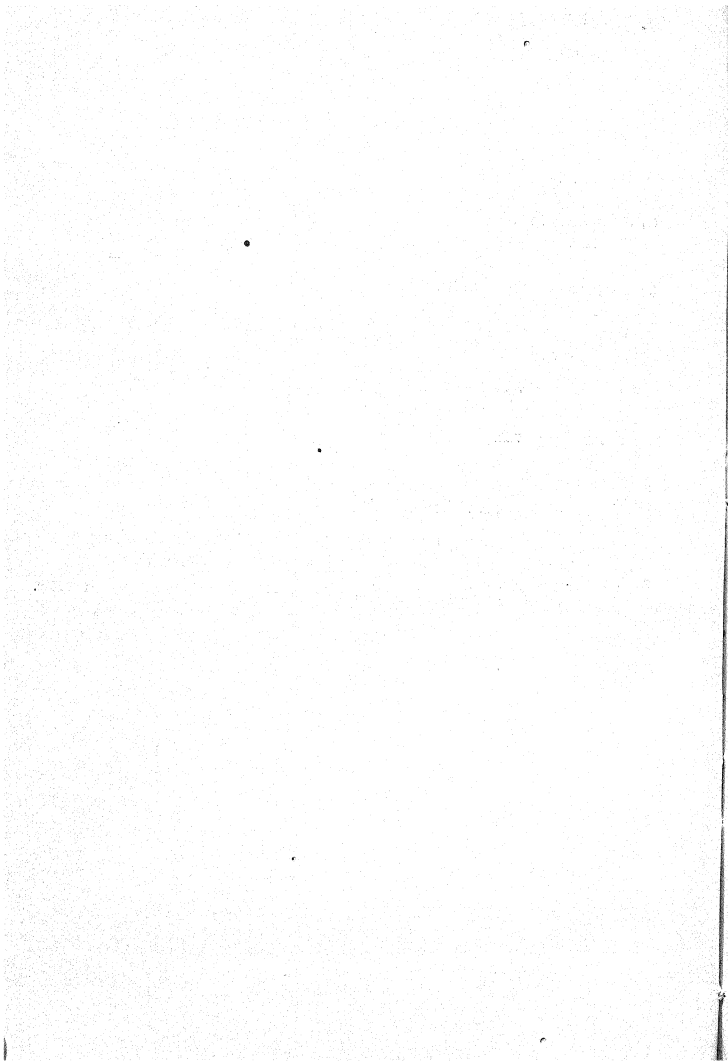
4. The Governor-General in Council may, by notification in the Gazette of India, make rules and prescribe forms for the purpose of carrying into effect the provisions of this Act.

Power to make rules and prescribe forms.

5. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Indian Companies Act, 1882.

Construction with Act VI, 1882.

VI of 1882.



THE COMPANIES BRANCH REGISTERS ACT, 1900.

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Note 1.—The thick figures at the end of each line refer to the pages of this Act and the alphabets in italics preceding the thick figures refer to the cases having corresponding thick letters against them in those pages.

2.—S in Brevier Roman denotes the section.

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THE
RELIGIOUS SOCIETIES ACT, 1880

(ACT I OF 1880).

(WITH THE CASE-LAW THEREON)

COMPILED AT
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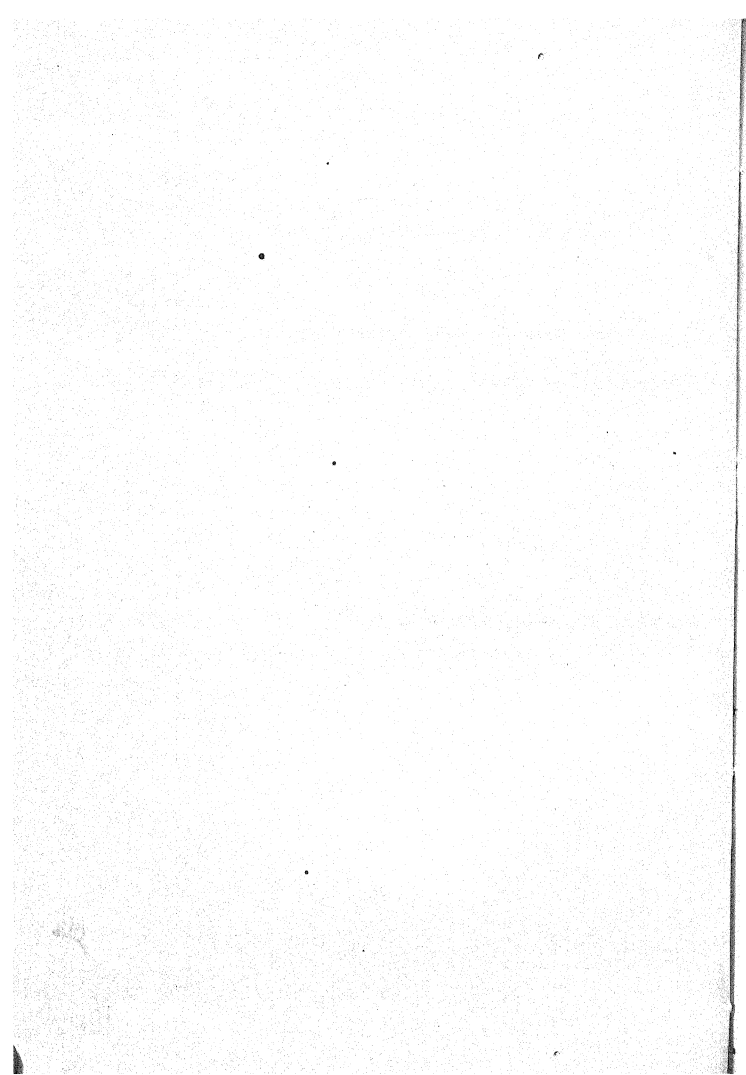
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THE RELIGIOUS SOCIETIES ACT, 1880.

(ACT I OF 1880.¹)

[*Passed on the 9th January, 1880.*]

An Act to confer certain powers on Religious Societies.

WHEREAS it is expedient to simplify the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose, and to provide for the dissolution of such bodies and adjustment of their affairs and for the decision of certain question relating to such bodies ; It is hereby enacted as follows :—

(Notes).

1.—“ Act I of 1880.”

(1) Statement of Objects and Reasons.

For—, see Gazette of India, 1879, Pt. V, p. 770.

A

(2) Proceedings in Council.

For—, see Gazette of India, 1879, Supplement pp. 598, 745 & 174 ; (*Ibid.*) 1880, Supplement, pp. 23 & 170.

B

(3) Places where the Act has been declared to be in force.

The Act has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874) to be in force in the following scheduled Districts in the Chutia Nagpur Division, namely :—

The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see Gazette of India, 1881, Pt. I, p. 504. The District of Lohardaga (now called the Ranchi District—See Calcutta Gazette, 1899, Pt. I, p. 44) included at this time the present District of Palamau, which was separated in 1894.

C

Short title.

1. This Act may be called the Religious Societies Act, 1880.

Commencement.

It shall come into force at once ; and

Local extent.

shall extend to the whole of British India ;

but nothing herein contained shall apply to any Hindus, Muhammadans or Buddhists, or to any persons whom the Governor-General in Council may from time to time, by notification in the Gazette of India, exclude from the operation of this Act.

Appointment of new trustee in cases not otherwise provided for.

2. When any body of persons associated for the purpose of maintaining religious worship has acquired, or hereafter shall acquire, any property,

and such property has been or hereafter shall be vested in trustees in trust for such body,

and it becomes necessary to appoint a new trustee in the place of or in addition to any such trustee or any trustee appointed in the manner hereinafter prescribed,

and no manner of appointing such new trustee is prescribed by any instrument by which such property was so vested or by which the trusts on which it is held have been declared, or such new trustee cannot for any reason be appointed in the manner so prescribed,

such new trustee may be appointed in such manner as may be agreed upon by such body, or by a majority of not less than two-thirds of the members of such body actually present at the meeting at which the appointment is made.

Appointment under section 2 to be recorded in a memorandum under the hand of the chairman of the meeting.

3. Every appointment of new trustees under section 2 shall be made to appear by some memorandum under the hand of the chairman for the time being of the meeting at which such appointment is made.

Such memorandum shall be in the form set forth in the schedule hereto annexed, or as near thereto as circumstances allow, shall be executed and attested¹ by two or more credible witnesses in the presence of such meeting, and shall be deemed to be a document of which the registration is required by the Indian

III of 1877. Registration Act, 1877, section 17.

(Notes).

I.—“Attested”.

(1) Attestation, meaning of.

- (a) The word “attest” means to bear witness, to affirm the truth, or genuineness of. 3 M.L.T. 300 (303). *Per Sankaran Nair, J.* D
- (b) Attestation is also a very common formality, required by law for ensuring the genuineness of a document. Attestation means that one or more persons are called in to witness the execution of a document and they then sign a statement to the effect that they saw the document executed. It is not uncommon for the law to make this attestation imperative. Mark Ev., p. 61. E
- (c) Where an instrument is required to be attested, the meaning is that a witness shall be present at its execution and shall testify that it has been executed by the proper person. 31 C. 861 (864). *Per Mookerjee, J.F*
- (d) The word “attest” implies the presence of some person who stands by, but is not a party to the transaction. *Seal v. Claridge*, 7 Q.B.D. 519, following *Freshfield v. Reed*, 9 M. & W. 404. See 3 M.L.T. 300 (304). G

I.—“Attested”—(Concluded).

- (e) Dr. Lushington said that “attest” meant “that the persons shall be present and see what passed and shall, when required, bear witness to the facts.” *Bryan v. White*, 2 Rob. 315 (317). See 3 M.L.T. 300 (304). H
- (f) To “attest” an instrument was held to be not merely to subscribe one’s name to it, as having been present at its execution, but to include also, essentially, the presence, in fact, at its execution, of some disinterested person capable of giving evidence as to what took place. *Ford v. Kettle*, 9 Q.B.D. 139. See 33 C. 861 (864) = 4 C.L.J. 41. *Per Mookerjee, J.* I
- (g) The term “attest” means that a witness shall be present to testify that the appointer has done the act required by the power. 3 M.L.T. 300 (302), *citing Farewell on Powers*, p. 137. J
- (h) To attest is to bear witness to a fact, and it is not necessary that the witness attesting a document should sign his name personally. *Per Mookerjee, J.*, 33 C. 861 (865) = 4 C.L.J. 41. K
- (i) “Attestation” means that what is said to be attested happened in the presence of the attesting witnesses. Effective attestation, therefore, need not include signature by the attesting witnesses personally. 7 C.W.N. 160; *cited in* 33 C. 861 (866). L

(2) Who can attest.

Attestation may generally be made by any person who is competent to attest. 44 Sol. Jo. 422; see *Phip. Ev.*, 4th Ed., p. 481. L-1

4. When any new trustees¹ have been appointed, whether in the manner prescribed by any such instrument as aforesaid or in the manner hereinbefore provided, the property subject to the trust shall forthwith, notwithstanding anything contained in any such instrument, become vested², without any conveyance or other assurance, in such new trustees and the old continuing trustees jointly, or, if there are no old continuing trustees, in such new trustees wholly, upon the same trusts, and with and subject to the same powers and provisions, as it was vested in the old trustees.

(Notes).

I.—“New trustees.”

(1) Exercise of powers by new trustees.

Every new trustee appointed, as well before as after all the trust property becomes, by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects, act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. See S. 10 of Trustee Act, (1893) sub-sec. 3. M

(2) Duty of new trustees with regard to ascertaining prior incumbrances.

(a) The new trustees are bound to ascertain, as far as possible, from the documents on hand, the incumbrances, if any, created by the beneficiaries,

1.—“New trustees”—(Concluded).

of which the retiring trustees have had notice. *Hallows v. Lloyd*, 39 Ch. D. 686. N

- (b) It is not the duty of the new trustees, however, to enquire of the retiring trustee whether he has had notice of any incumbrances by the beneficiaries. *Phipps v. Lovegrove*, 16 Eq. 80. O

2.—“Vested.”

“Vest,” meaning of.

- (a) The words “to vest” have several senses. Originally the word had reference only to real estate. As applied to “estates in land,” “to vest” signifies the acquisition of a portion of the actual ownership of the land; the acquisition, not of an estate in possession, but of an actual estate. The “fee simple” being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with or vested in him, an estate in the land. Thus “vested” is nearly equivalent to “possessed.” *Wills by Hawkins*, p. 221. P

- (b) In this, its original sense, “vested” has no reference to the absence of conditionality or contingency. For example, where an estate is limited to “A for life with remainder to B,” B’s estate is a vested estate, because such a remainder vests in B an actual portion of the “fee,” though the time of its falling into possession is wholly contingent and uncertain. B is invested with a portion of the ownership of the land. (*Ibid.*) Q

Saving of existing modes of appointment and conveyance.

5. Nothing herein contained shall be deemed to invalidate any appointment of new trustees, or any conveyance of any property, which may hereafter be made as heretofore was by law required.

6. Any number not less than three-fifths of the members of any such body as aforesaid may, at a meeting convened for the purpose, determine that such body shall be dissolved; and thereupon it shall be dissolved forthwith, or at the time then agreed upon; and all necessary steps shall be taken for the disposal and settlement of the property of such body, its claims and liabilities, according to the rules of such body applicable thereto, if any, and, if not, then as such body at such meeting may determine:

Provision for dissolution of societies, and adjustment of their affairs.

Provided that, in the event of any dispute arising among the members of such body, the adjustment of its affairs shall be referred to the principal Court of original Civil jurisdiction of the district in which the chief building of such body is situate; and the Court shall make such order in the matter as it deems fit.

7. If upon the dissolution of any such body there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of such body or any of them, but shall be given to some other body of persons associated for the purpose of maintaining religious worship or some other religious or charitable purpose to be determined by the votes of not less than three-fifths of the members present at a meeting convened in this behalf, or in default thereof by such Court as last aforesaid.

8. Nothing in Ss. 6 and 7 shall be deemed to affect any provision contained in any instrument for the dissolution of such body, or for the payment or distribution of such property.

9. When any question arises, either in connection with the matters hereinbefore referred to, or otherwise, as to whether any person is a member of any such body as aforesaid, or as to the validity of any appointment under this Act, any person interested in such question may apply by petition to the High Court for its opinion on such question. A copy of such petition shall be served upon, and the hearing thereof may be attended by, such other persons interested in the question as the Court thinks fit.

Any opinion given by the Court on an application under this section shall be deemed to have the force of a declaratory decree.

The costs of every application under this section shall be in the discretion of the Court.

THE SCHEDULE.

(See Section 3).

Memorandum of the appointment of the new trustees of the
(describe the church, chapel, or other building and property) situate
at a meeting duly convened and held for that purpose
(in the vestry of the said) on the day of
18 , A. B. of Chairman.

Names and descriptions of all the trustees on the constitution
or last appointment of trustees, made the day of

(here insert the same.)

Names and descriptions of all the trustees in whom the said
(chapel and property) now become legally vested.

First—Old continuing trustees :—

(here insert the same).

Second—New trustees now chosen and appointed :—

(here insert the same).

Dated this day of 18 .

Signed by the said *A. B.* as
Chairman of the said Meeting, at
and in the presence of the said
Meeting on the day and year
aforesaid in the presence of—

A. B.,
Chairman of the said Meeting.

C. D.

E. F.

THE RELIGIOUS SOCIETIES ACT, 1880.

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Note 1.—The thick figures at the end of each line refer to the pages of this Act and the alphabets in italics preceding the thick figures refer to the cases having corresponding thick letters against them in those pages.

2.—S in Brevier Roman denotes the section.

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THE
INDIAN COMPANIES MEMORANDUM OF
ASSOCIATION ACT, 1895.

(ACT XII OF 1895.)

(WITH THE CASE-LAW THEREON)

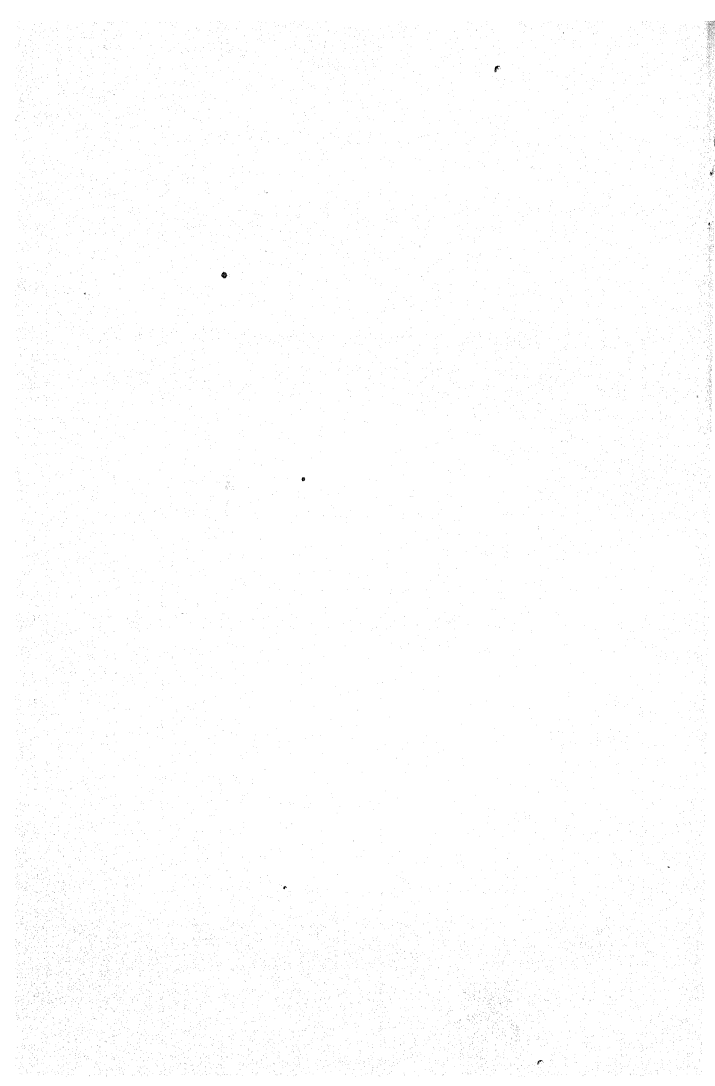
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THE INDIAN COMPANIES MEMORANDUM OF ASSOCIATION ACT, 1895.

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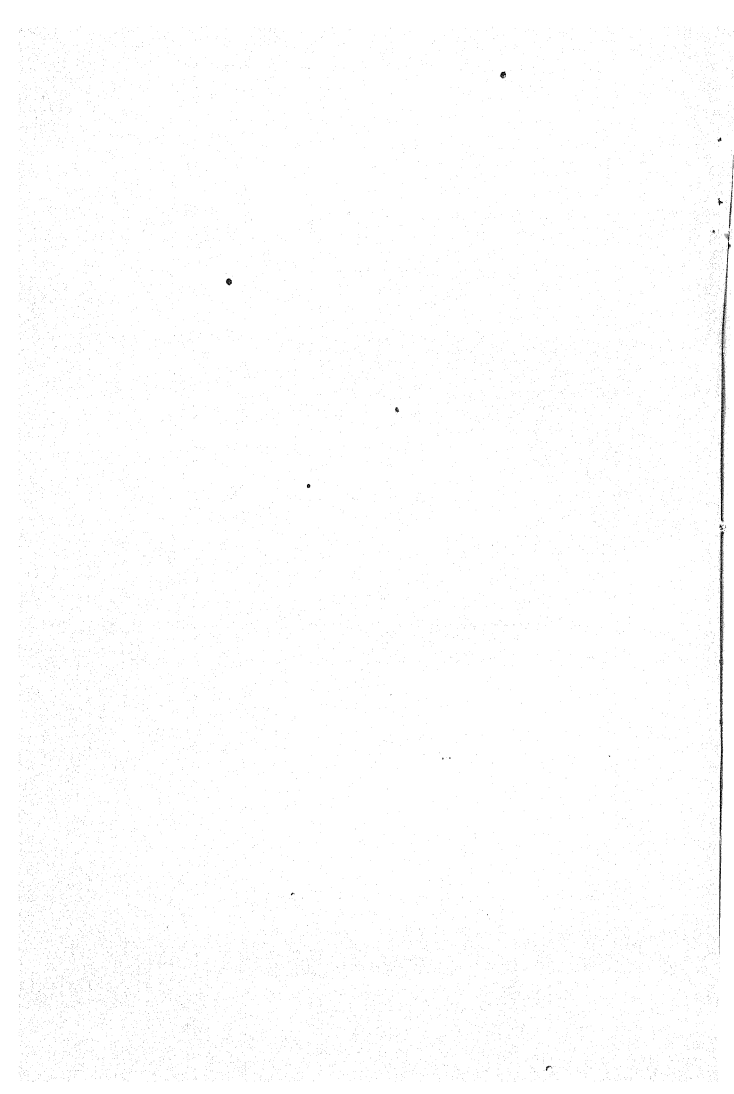
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INDIAN COMPANIES (MEMORANDUM OF ASSOCIATION) ACT, 1895.

(ACT XII OF 1895) ¹.

[PASSED ON THE 21ST MARCH, 1895.]

An Act to give Power to Companies to make certain alterations in the instruments under which they are constituted, and to amend the Indian Companies Act, 1882,

VI of 1882.

WHEREAS it is expedient to give to Companies power to alter the provisions of the instruments, under which they are constituted in certain cases; and whereas it is also expedient to amend S. 65 of the Indian Companies Act, 1882: It is hereby enacted as follows :—

(Notes).

1.—“Act XII of 1895.”

(1) Statement of Objects and Reasons.

For—see Gazette of India, 1895, Pt. V, p. 2.

A

(2) Report of the Select Committee.

For—see Gazette of India, 1895, Pt. V, p. 55.

B

(3) Proceedings in Council.

For—see Gazette of India, 1895, Pt. V, pp. 38, 216, 234 & 263.

C

(4) Places where the Act has been declared to be in force.

The Act has been declared to be in force in Upper Burma (except the Shan States), by the Burma Laws Act, 1898 (XIII of 1898).

D

Short title and commencement.

1. (1) This Act may be called the Indian Companies (Memorandum of Association) Act, 1895; and

(2) It shall come into force at once.

Sections 3 to 10 to be read with Act VI of 1882.

2. Sections 3 to 10 (both inclusive) shall be read with and taken as part of the Indian Companies Act, 1882.

VI of 1882.

Definitions.

3. In this Act, unless there is something repugnant in the subject or context,—

(1) The expression “deed of settlement” includes any contract of co-partnery or other instrument constituting or regulating a Company, and not being an Act of Parliament, a Royal Charter, or Letters Patent; and

(2) the expression "High Court" means, for the town of Rangoon, the Recorder ¹, and, elsewhere, the High Court as defined in the General Clauses Act, 1868 ².

t of 1868.

(Notes).

1.—"*For the town of Rangoon, the Recorder.*"

Chief Court for the town of Rangoon.

There is now a—, see the Lower Burma Courts Act, 1900 (VI of 1900). E

2.—"*The General Clauses Act, 1868.*"

N.B.—See how the General Clauses Act, 1897 (X of 1897). F

4. Subject to the provisions of this Act, a Company registered

VI of 1882.

Power for company to alter objects or form of constitution subject to confirmation by High Court.

under the Indian Companies Act, 1882, may, by special resolution ¹ alter the provisions of its memorandum of association ² or deed of settlement with respect to the object of the Company, so far as may be required for any of the purposes hereinafter specified, or alter the form of its constitution by substituting a memorandum and articles of association ³ for a deed of settlement, either with or without any such alteration as aforesaid with respect to the objects of the Company; but in no case shall any such alteration take effect until confirmed on petition by the High Court.

(Notes).

1.—"*Special resolution.*"

Definition of "Special resolution."

For—see S. 77, The Indian Companies Act, 1882. G

2.—"*Memorandum of Association.*"

(1) Memorandum—Nature of.

The memorandum of association of a Company is its charter, and fixes the limits and extent of its powers. *Ashbury Rail, Carriage and Iron Co. v. Riche*, L.R., 7 H.L. 668. H

(2) Memorandum—Generally unalterable.

The memorandum of association is the fundamental and, except in certain specified particulars, the unalterable law of Companies incorporated in virtue of it. *Per Lord Selborne*, (*Ibid.*) at p. 693. I

3.—"*Articles of association.*"

1) Articles of association, nature of.

(a) The articles of association of a Company are a contract between all the share-holders to comply with the regulations contained in them. They are binding on all until altered in the manner provided by the Companies Act, i.e., by a meeting duly called to pass a resolution altering them. Any dispute that may arise among them must be primarily decided with reference to the principles contained in those articles. 10 B. 415. J

3.—“Articles of association”.—(Concluded).

- (b) The articles of association govern the internal affairs of the Company and may be termed bye-laws of the Company. See *Gore-Browne*, and *Gordon*, 30th Ed., p. 87. K
- (c) The articles constitute an agreement between the members, *inter se*, and would not enable an outsider to sue the Company for a breach of the provisions therein. *Eley v. Positive Assurance Co.*, (1876) 1 Ex. D. 88. L
- (d) “They play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of the Company, and so, accepting it, define the duties, rights, and powers of the governing body as between themselves and the Company at large, and the mode and form in which changes in the internal regulations of the Company may from time to time be made.” *Per Lord Cairns in Ashbury Carriage Co. v. Riche*, (1875) 7 H. L. 653. M
- (e) The articles, however, cannot take away the powers which the members are given by the Act. See *Payne v. Cork Co.*, (1900) 1 Ch. 308. N
- (f) “The articles must not contain anything illegal or *ultra vires* the Company”. *Topham*, 2nd Ed., p. 51. O

(2) Articles—Functions of.

The Articles of Association perform a two-fold function :—

- (1) They define the duties and powers of the directors.
- (2) They ensure that all who deal with the directors shall have notice of the precise limits of their authority. *Small v. Smith*, (1884) 10 A. C. at p. 138. P

(3) Articles cannot override memorandum.

Where the provisions of the memorandum are inconsistent with those of the articles, the former should prevail. *Wedgwood Coal and Iron Co.*, *Anderson's case*, (1878) 7 Ch. D. 75. Q

(4) Articles may explain memorandum.

But the articles may be useful to explain the memorandum where its provisions are ambiguous. *Capital Fire Insurance Association*, (1882) 21 Ch. D. 209. R

Particulars as to which Court must be satisfied before confirmation.

5. Before confirming any such alteration the High Court must be satisfied—

- (a) that sufficient notice ¹ has been given to every holder of debentures ² or debenture stock of the company, and every person or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that, with respect to every creditor who, in the opinion of the Court, is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained, or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class of persons, for special reasons, dispense with the notice required by this section.

(Notes).

1—"Sufficient notice."

(1) Notice—Requisites.

The notice must be absolute, not contingent or conditional. *Alexander v. Simpsons*, 43 Ch. D. 139. S

(2) Sufficiency of notice depends on circumstances of case.

The sufficiency of a notice is to be determined according to the circumstances of each case. *Normandy v. Ind Coope Co.*, (1908) 1 Ch. 84. T

(3) Resolution, not necessarily to be identical with notice.

A resolution need not be in the identical terms of the resolution specified in the notice. For instance, where a notice specifies a resolution to the effect that the director's remuneration shall be 40 per cent. of certain profits, and it is passed at 30 per cent. the alteration does not invalidate the resolution. *Torback v. Lord Westbury*, (1902), 2 Ch. 871. U

(4) General meeting, notice of—Alterations to be proposed not mentioned—Insufficiency.

Where the notice was given of an extraordinary meeting for the purpose of altering the articles of a Company, the general nature of the business in the circumstances was held to be insufficiently indicated, since the nature of the alterations proposed did not appear in the notice. *Normandy v. Ind Coope & Co.*, (1908) 1 Ch. 84. Y

(5) Notice to whom to be sent.

The notice must be sent to all entitled to attend the meeting. If this is not done, any resolution passed at the meeting will be invalid. *Smith v. Darby*, 2 H.L.C. 789; *Rea v. Langhorn*, 6 N. & M. 203. W

(6) Address to be given in notice.

It is not necessary that the notice should be addressed exactly in the same way as the member's address appears upon the register; but the member's place of abode must be given with sufficient accuracy. *Liverpool Co. v. Haughton*, 23 W.R. 93. X

(7) Notice to representatives—Necessity.

Representatives of a bankrupt or deceased share-holder are not entitled to receive notices unless they have become members by formal registration. *Allen v. Gold Reefs of West Africa*, (1900) 1 Ch. 656. Y

(8) Notice to share-holders abroad unnecessary.

Notices need not be sent to share-holders who choose to reside abroad. *Union Hills Silver Co.*, 22 L. T. 400; *Smith v. Darby*, 2 H.L. C. 789. Z

(9) Notice of resolution, to indicate needlessness of Confirmation.

The notice convening a meeting for the purpose of passing an extraordinary resolution must contain something to show that it is proposed to pass a resolution as will not require confirmation. *Bridport Old Brewery Co.*, 2 Ch. App. 191. A

1.—“*Sufficient notice*”—(Concluded).

(10) **Special resolution—Single notice for two meetings—Sufficiency.**

A provision in the articles that the two meetings necessary in the case of a special resolution may be convened by the same notice is good.
Re North of England Steamship Co., (1905) 2 Ch. 15. B

2.—“*Debentures.*”

(1) **Debenture, what it is.**

A debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture. *Per Chitty, J.*, in *Levy v. Abercorn's Slate Co.*, (1898) 37 Ch. D. 264. C

(2) **Definition,**

“I cannot find any precise legal definition of the term; it is not either in law or procedure a strictly technical term, or what is called a term of art. (*Ibid.*) D

Power of Court when confirming to impose terms and make order as to costs.

6. An order confirming any such alteration may be made on such terms and subject to such conditions as to the Court may seem fit, and the Court may make such orders as to costs as it may deem proper.

7. The High Court shall, in exercising its discretion under this Act, have regard to the rights and interests of the members of the company, or of any class of those members, as well as to the rights and interests of the creditors, and may, if it shall think fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purpose of the interests of dissentient members; and the Court may give such directions, and make such orders, as it may think expedient for the purpose of facilitating any such arrangement, or carrying the same into effect:

Provided always that it shall not be lawful to expend any part of the capital of the company in any such purchase.

8. The High Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company—

Ground on which Court may confirm a proposed alteration.

- (a) to change the place of the registered office of the company from one part of British India to another; or
- (b) to carry on its business more economically or more efficiently; or

- (c) to attain its main purpose by new or improved means ; or
- (d) to enlarge or change the local area of its operations ; or
- (e) to carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company ; or
- (f) to restrict or abandon any of the objects specified in the memorandum of association or deed of settlement.

9. (1) Where a company has altered the provisions of its memorandum of association or deed of settlement with respect to the place of its registered office or to the objects of the company, or has altered the form of its constitution by substituting a memorandum and articles of association for a deed of settlement, and such alteration has been confirmed by the Court, a certified copy of the order confirming such alteration, together with a printed copy of the memorandum of association or deed of settlement so altered, or together with a printed copy of the substituted memorandum and articles of association (as the case may be) shall be delivered by the company to the Registrar of Joint-Stock Companies within three months from the date of the order, and the Registrar shall register the same, and shall certify under his hand the registration thereof, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to such alteration and the confirmation thereof have been complied with.

(2) When any such alteration as aforesaid involves a transfer of the registered office to a part of British India other than that in which the office is at which the company is registered, a certified copy of the order confirming such change shall be delivered by the company to the Registrar of Joint-Stock Companies in each of such parts, and each of such Registrars shall register the same, and shall certify under his hand the registration thereof, and the Registrar for the part from which such office is transferred shall send to the Registrar for the other part all documents relating to the company registered in his office.

(3) From the date of such registration (but subject to the provisions of this Act) the memorandum or deed of settlement so altered shall be the memorandum of association or deed of settlement of the company, or, as the case may be, such substituted memorandum

and articles of association shall apply to the company in the same manner as if the company were a company registered under Part I, of the Indian Companies Act, 1882, with such memorandum VI of 1882. and articles of association, and the company's deed of settlement shall cease to apply to the company.

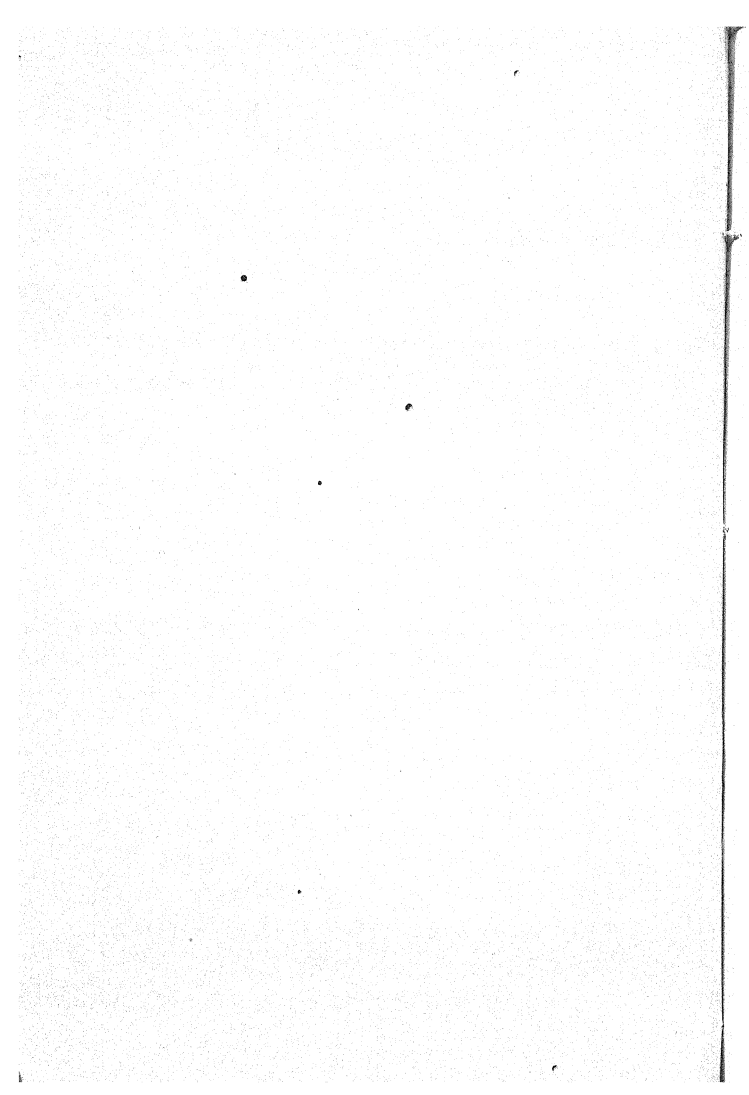
(4) For every registration under this section the reshall be payable to the Registrar of Joint-Stock Companies a fee of five rupees.

10. No such alteration as aforesaid shall have any operation until registration thereof has been duly effected under the last foregoing section; and, if such registration shall not have been effected within three months next after the date of the order of the Court confirming the alteration, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months, become and be absolutely null and void:

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

11. In section 65 of the Indian Companies Act, 1882, for the VI of 1882. words, "in such language or languages," the second time they occur, the words, "in the English language," shall be substituted.

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THE
SOCIETIES REGISTRATION ACT, 1860.

(ACT XXI OF 1860.)

(WITH THE CASE-LAW THEREON)

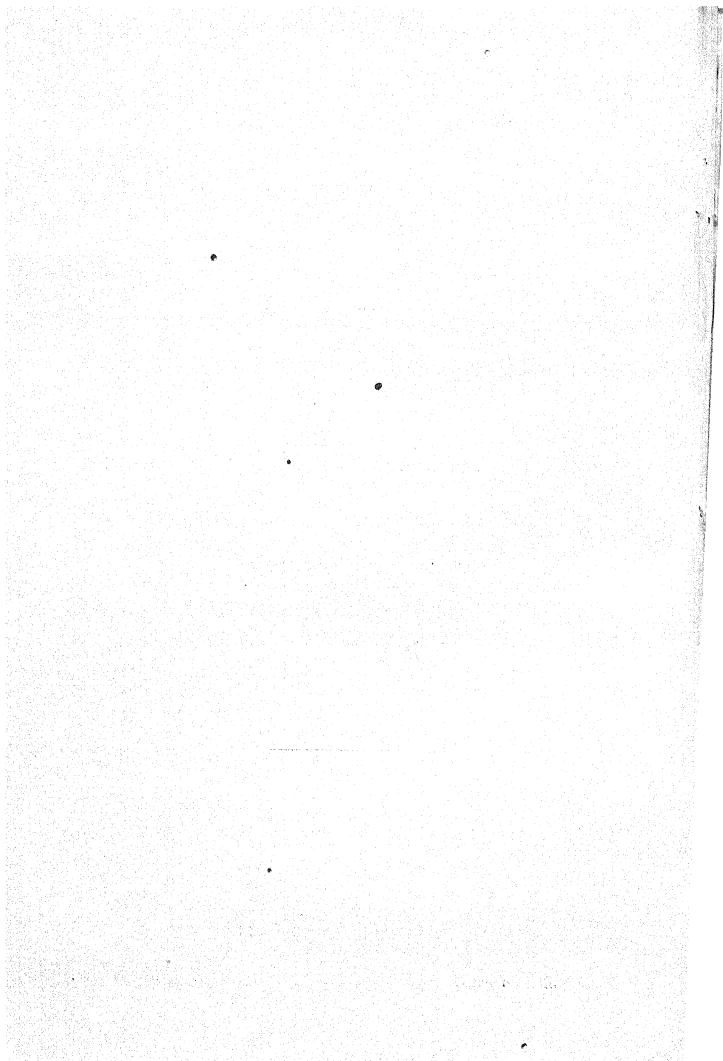
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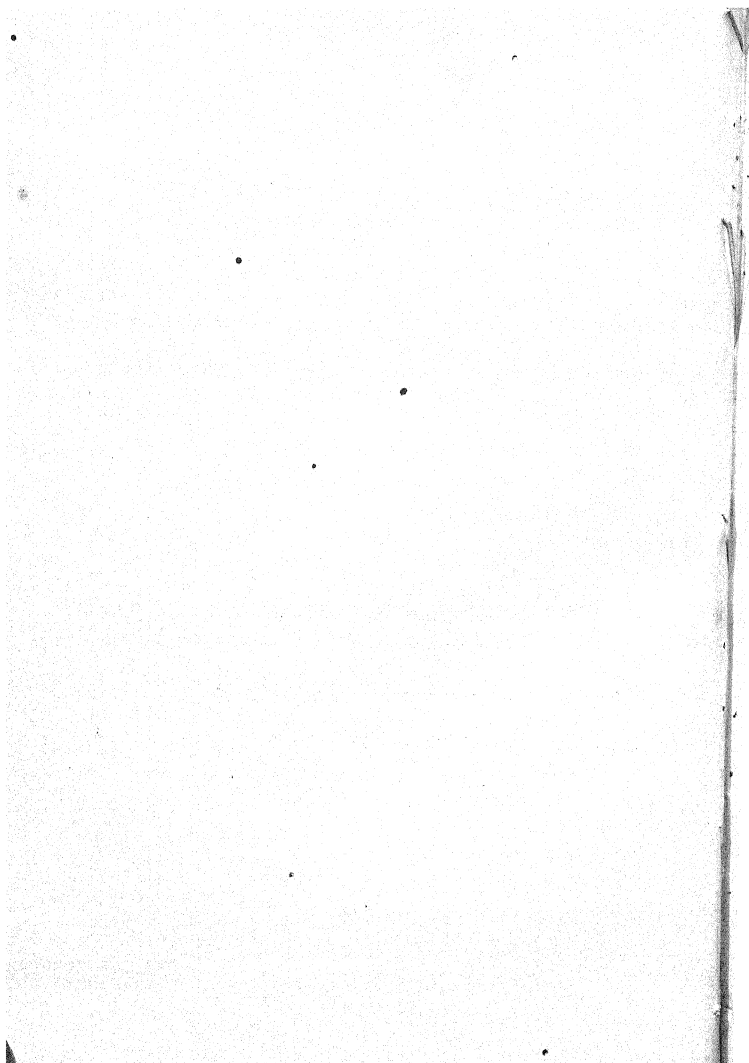
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THE SOCIETIES REGISTRATION ACT, 1860 ¹.

(ACT XXI OF 1860.)

[Passed on the 21st May, 1860.]

HISTORICAL MEMOIR. •

Year.	No. of Act.	Name of Act.	How affected.
1860	XXI	Societies Registration ...	Rep. in part, Act XVI of 1874.

An Act for the Registration of Literary, Scientific and Charitable Societies.

WHEREAS it is expedient that provision should be made for improving the legal condition of societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, or for charitable purposes; It is enacted as follows:—

(Notes).

1.—“The Societies Registration Act, 1860.”

(1) Short title.

This Act is called “The Societies Registration Act, 1860.” See the Indian Short Titles Act, 1897 (XIV of 1897), A

(2) Basis of Act.

The Act (with the exception of the first four sections) is based on the Literary and Scientific Institutions' Act, 1854 (17 and 18 Vict., C. 112), S. 20 *et seq.* B

(3) Places where Act has been declared to be in force.

It has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by S. 3 of the Laws Local Extent Act, 1874 (XV of 1874).

It has been declared to be in force in Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898).

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

West Jalpaiguri ... See *Gazette of India*, 1881, Pt. I, p. 74.

The Districts of Hazaribagh, Lohardaga
[now the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44], and Manbhum
and Pargana Dalbhum and the Kolhan
the District of Singbhum ...

do. 1881, Pt. I, p. 504.

1.—“The Societies Registration Act, 1860”—(Concluded).

The Scheduled portion of the Mirzapur District	...	See <i>Gazette of India</i> , 1879, Pt. I, p. 383.
Jaunsar Bawar	...	do. 1879, Pt. I, p. 302.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Gazi Khan. [*Portions of the District of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Provinces, see Gazette of India, 1901, Pt. I, p. 857, and ibid, 1902, Pt. I, p. 575; but its application has been barred to that portion of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal), Regulation] 2 of 1900.*

Punjab and N.W. Code]	...	do.	1886, Pt. I, p. 48.
The Scheduled Districts in Ganjam and Vizagapatam	...	do.	1898, Pt. I, p. 870.
The District of Sylhet	...	do.	1879, Pt. I, p. 631.
The rest of Assam (except the North Lushai Hills)	...	do.	1897, Pt. I, p. 299.

It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely:—

Sindh	...	See <i>Gazette of India</i> , 1880, Pt. I, p. 672.
Kumaon and Garhwal	...	do. 1876, Pt. I, p. 606.
Ajmer and Merwara	...	do. 1878, Pt. I, p. 380.

It has been declared, by notification under S. 3 (b) of the same Act, not to be in force in the Scheduled Districts of Lahaul. See *Gazette of India*, 1886, Pt. I, p. 301. C, D

1. Any seven or more persons ¹ associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in S. 20 of this Act, may, by subscribing ² their names to a memorandum of association and filing the same with the Registrar of Joint-Stock Companies* * * form themselves into a society under this Act.

Societies formed by memorandum of association and registration.

(Notes).

Legislative changes.

The words and figures “under Act XIX of 1857” in this section were repealed by the Repealing Act, 1874 (XVI of 1874). See now the Indian Companies Act, 1882 (VI of 1882), S. 255. E

1.—“Person.”

Person—Meaning.

The term “person” includes any Company or Association or body of individuals whether incorporated or not. See General Clauses Act, X of 1897, S. 3 (39). F

2.—“By subscribing.”

Signature by agent orally authorised, valid.

The memorandum may be signed by an agent authorised on their behalf even orally. *Whitley Partners, Limited*, 32 Ch. D. 337. **G**

Memorandum of association. 2. The memorandum of association¹ shall contain the following things (that it is to say) :—

the name of the society² :

the objects of the society³ :

the names, addresses, and occupations of the governors, council, directors, committee or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association.

(Notes).

1.—“Memorandum of association.”

Memorandum—Nature of.

The memorandum of association of a society is its charter, and fixes the limits and extent of its powers. *Ashbury Rail, Carriage and Iron Co. v. Riche*, L.R., 7 H.L. 668. **H**

2.—“Name of the society.”

Importance of name.

The name of the society may be important in construing the objects defined in the memorandum of association. *Re Crown Bank*, 1890, 44 Ch. D. 634 ; *Stephens v. Mysore Reefs*, (1902), 1 Ch. 745. **I**

3.—“Objects of the society.”

(1) Objects of the society to be legal.

The object of a society should not be the doing of anything illegal, immoral or contrary to public policy. See *Treuer v. Whitworth*, (1887), 12 A.C. 409. **J**

(2) Objects to be specified clearly.

The object must be set with reasonable clearness. See *Re Fraser, Ltd.*, W.N. (1903), 73. **K**

(3) Society's powers limited to objects in Memorandum.

The powers of a society to transact business are restricted to the objects specified in the memorandum. Any act which is beyond the objects thus specified is *ultra vires* and void. *Ashbury Carriage Co. v. Riche*, (1875), 7 H.L. 653. **L**

(4) General words in memorandum—How construed.

(a) General words in the memorandum which when construed literally may mean anything “must be taken in connection with what are shown by the context to be the dominant or main objects.” *Per Lindley, L.J. Re German Date Coffee Co.*, 1882, 2 O.C.D. 169. *Pedlar v. Road Block Mines*, (1905), 2 Ch. 427. **M**

3.—“Objects of the society”.—(Concluded).

- (b) In spite of a statement in the objects clause that each paragraph is to be read independently and is not to be limited by the terms of other paragraphs, if the main object is set forth in one paragraph, the other paragraphs will be read only as ancillary to it. *Stephens v. Mysore Reefs*, (1902), 1 Ch. 745. N

3. Upon such memorandum and certified copy being filed, the Registrar shall certify under his hand that the society is registered under this Act. There shall be paid to the Registrar for every such registration a fee of fifty rupees, or such smaller fee as the Governor-General of India in Council may, from time to time, direct; and all fees so paid shall be accounted for to Government.

Registration.¹

Fees.

(Note).

1.—“Registration.”

Registration—Effect.

The legal entity created by registration is a corporate body, totally distinct from the individuals comprising it. See *Kodlik Ltd. v. Clark*, (1903), 1 K. B. 505. O

4. Once in every year¹, on or before the fourteenth day succeeding the day on which, according to the rules of the society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list² shall be filed with the Registrar of Joint-Stock Companies of the names, addresses and occupations of the governors, council, directors, committee or other governing body then entrusted with the management of the affairs of the society.

Annual list of managing body to be filed.

(Notes).

1.—“Year.”

“Year,” meaning of.

“Year” means a calendar year, i.e., the period from 1st January to 31st December, and does not mean a period of twelve months from the date of the registration of the company. *Gibson v. Barton*, L.R. 10 Q.B. 329; *Edmonds v. Foster*, 30 L.T. 690. P

2.—“List.”

List to be in accordance with the facts.

The requirements of the section are not satisfied if the list and the summary are not in accordance with the facts. *Briton Medical and General Life Association*, 39 Ch. D. 61; see *Russell and Bayley*, 3rd Ed., p. 64. Q

5. The property, moveable and immoveable, belonging to a society registered under this Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society, and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title.

6. Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion :

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

(Note).

1.—“ Suits by and against societies.”

Right to sue—Gift to certain persons for purposes of a society not then in existence—Subsequent incorporation of such society under Act XXI of 1860—No formal written transfer of rights by original donees—Right of Managing Committee to sue in respect of such gift—Interpretation of deed.

On the 2nd May, 1885, one B N S executed a deed of gift of certain property in favour of fifteen persons, including himself, named in the deed, and called in it the Managing Committee of a certain school which it was the purpose of the grant to establish. The Committee was empowered to add to its numbers, and to frame rules, draw up schemes to manage the gifted property and generally to do all acts necessary to carry out the purposes of the grant. The said Managing Committee registered itself as a corporate body, under Act XXI of 1860, on the 3rd November, 1885, but no formal written transfer of rights was made by the original donees in favour of such corporate body. On the 1st December, 1890, the President and Secretary of the incorporated institution sued on its behalf to enforce the terms of the deed of gift as against the donor, but their suit was dismissed on the grounds that the gift was made to a body and to an institution not legally in existence at the time, that it was in favour of specific persons, that the registration of the Committee did not take place till some seven months after the gift, that the school was not yet in existence, and that in consequence the President and Secretary of the Committee were not entitled to bring the present suit to enforce the said gift.

Held, upon consideration of the terms of the deed of gift and the facts of the case, that the plaintiffs, as representatives of the Managing Committee, were entitled to enforce the rights of the persons who formed

3.—“Objects of the society”—(Concluded).

(b) In spite of a statement in the objects clause that each paragraph is to be read independently and is not to be limited by the terms of other paragraphs, if the main object is set forth in one paragraph, the other paragraphs will be read only as ancillary to it. *Stephens v. Mysore Reefs*, (1902), 1 Ch. 745. N

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Annual list of
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6. Every society registered under this Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion :

Provided that it shall be competent for any person having a claim or demand against the society, to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

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1.—“Suits by and against societies”—(Concluded).

the original Managing Committee, and who were the donees under the said deed of gift, the suit not being one to enforce a contract with the previous Managing Committee, but to recover property said to have been granted to it.

Held, also, that it was not absolutely essential under the circumstances of the case, that there should have been a formal written transfer in favour of plaintiffs by the members of the original Managing Committee of all their rights under the gift. 41 P.R. 1897. R

7. No suit or proceeding in any Civil Court shall abate or dis-continue by reason of the person by or against whom such suit or proceedings shall have been brought or continued, dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceedings shall be continued in the name of or against the successor of such person.

8. If a judgment shall be recovered against the person or officer named on behalf of the society, such judgment shall not be put in force against the property, moveable or immoveable, or against the body of such person or officer, but against the property of the society.

Enforcement of judgment against Society.

The application for execution shall set forth the judgment, the fact of the party against whom it shall have been recovered having sued or having been sued, as the case may be, on behalf of the society only, and shall require to have the judgment enforced against the property of the society.

9. Whenever by any bye-law duly made in accordance with the rules and regulations of the society, or, if the rules do not provide for the making of bye-laws, by any bye-law made at a general meeting of the members of the society convened for the purpose (for the making of which the concurrent votes of three-fifths of the members present at such meeting shall be necessary), any pecuniary penalty is imposed for the breach of any rule or bye-law of the society, such penalty, when accrued, may be recovered in any Court having jurisdiction where the defendant shall reside, or the society shall be situate, as the governing body thereof shall deem expedient.

10. Any member who may be in arrear of a subscription which, according to the rules of the society he is bound to pay, or who shall possess himself of or detain any property of the society in a manner

Members liable to be sued as strangers.

or for a time contrary to such rules, or shall injure or destroy any property of the society, may be sued for such arrear or for the damage accruing from such detention, injury or destruction of property in the manner hereinbefore provided.

But if the defendant shall be successful in any suit or other proceeding brought against him at the instance of the society, and shall be adjudged to recover his costs, he may elect to proceed to recover the same from the officer in whose name the suit shall be brought, or from the society, and in the latter case shall have process against the property of the said society in the manner above described.

Recovery by
successful defendant
of costs adjudged.

11. Any member of the society who shall steal, purloin, or embezzle any money or other property, or wilfully and maliciously destroy or injure any property of such society, or shall forge any deed, bond, security for money, receipt, or other instrument, whereby the funds of the society may be exposed to loss, shall be subject to the same prosecution, and, if convicted, shall be liable to be punished in like manner as any person not a member would be subject and liable to in respect of the like offence.

Members guilty of
offences punishable
as strangers.

12. Whenever it shall appear to the governing body of any society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of this Act, or to amalgamate such society either wholly or partially with any other society, such governing body may submit the proposition to the members of the society in a written or printed report and may convene a special meeting for the consideration thereof according to the regulations of the society;

Societies enabled
to alter, extend or
abridge their pur-
poses.

but no such proposition shall be carried into effect unless such report shall have been delivered or sent by post to every member of the society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such proposition shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of one month after the former meeting.

13. Any number not less than three-fifths of the members of any society may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the said society applicable thereto, if any, and, if not, then as the governing body shall find expedient, provided that, in the event of any dispute arising among the said governing body or the members of the society, the adjustment of its affairs shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building of the society is situate; and the Court shall make such order in the matter as it shall deem requisite :

Provided that no society shall be dissolved unless three-fifths of the members shall have expressed a wish for such dissolution by their votes delivered in person, or by proxy, at a general meeting convened for the purpose :

Provided that whenever the Government is a member of, or a contributor to, or otherwise interested in, any society registered under this Act, such society shall not be dissolved without the consent of Government.

14. If upon the dissolution of any society registered under this Act there shall remain after the satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the members of the said society or any of them, but shall be given to some other society, to be determined by the votes of not less than three-fifths of the members present personally or by proxy at the time of the dissolution, or, in default thereof, by such Court as aforesaid : Provided, however, that this clause shall not apply to any society which shall have been founded or established by the contributions of share-holders in the nature of a Joint-stock Company.

15. For the purposes of this Act a member of a society shall be a person who, having been admitted therein according to the rules and regulations thereof, shall have paid a subscription, or shall have signed the roll

or list of members thereof, and shall not have resigned in accordance with such rules and regulations; but in all proceedings under this Act no person shall be entitled to vote or to be counted as a member whose subscription at the time shall have been in arrear for a period exceeding three months.

Disqualified members.

16. The governing body of the society shall be the governors, council, directors, committee, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted.

The governing body defined.

17. Any company or society established for a literary, scientific or charitable purpose, and registered under Act XLIII of 1850, or any such society established and constituted previously to the passing of this Act but not registered under the said Act XLIII of 1850, may at any time hereafter be registered as a society under this Act; subject to the proviso that no such company or society shall be registered under this Act unless an assent to its being so registered has been given by three-fifths of the members present personally, or by proxy, at some general meeting convened for that purpose by the governing body.

Registration of societies formed before Act.

Assent required.

In the case of a company or society registered under Act XLIII of 1850, the directors shall be deemed to be such governing body.

In the case of a society not so registered, if no such body shall have been constituted on the establishment of the society, it shall be competent for the members thereof, upon due notice, to create for itself a governing body to act for the society thenceforth.

(Note).

Legislative changes.

Act XLIII of 1850 has been repealed by the Indian Companies Act, 1966 (X of 1966), S. 210. S

18. In order to any such society as is mentioned in the last preceding section obtaining registry under this Act, it shall be sufficient that the governing body file with the Registrar of Joint-stock Companies * * * a memorandum showing the name of the society, the objects of the society, and the names, addresses and occupations of the governing body,

Such societies to file memorandum, etc., with Registrar of Joint-stock Companies.

together with a copy of the rules and regulations of the society certified as provided in section 2, and a copy of the report of the proceedings of the general meeting at which the registration was resolved on.

(Note).

Legislative changes.

The words and figures "under Act XIX of 1857" in this section were repealed by Act XVI of 1874. T

N.B.—See now the Indian Companies Act, 1882 (VI of 1882), S. 255.

19. Any person may inspect all documents filed with the Registrar under this Act on payment of a fee of one rupee for each inspection, and any person may require a copy or extract of any document or any part of any document, to be certified by the Registrar, on payment of two annas for every hundred words of such copy or extract; and such certified copy shall be *prima facie* evidence of the matters therein contained in all legal proceedings whatever..

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Certified copies.

20. The following societies may be registered under this Act:—charitable societies¹, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs.

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- (a) A religious purpose may be a charitable purpose, and a society for religious purposes will ordinarily be a society for charitable purposes. Charitable purposes are not restricted to the giving of alms or other charitable reliefs, but the words have a much wider legal meaning. [*In re White*: *White v. White*, L.R. (1893); 2 Ch. D. 41, F.]. 28 A. 384 = A.W.N. (1906) 159 = 3 A.L.J. 124. U
- (b) A religious society, which had, for its object, the control and management of, and the protection of the property appertaining to, or certain public mosque, was held to be a society which might legally be registered under the provisions of the Societies Registration Act, 1860. (*Ibid.*) Y

THE SOCIETIES REGISTRATION ACT, 1860.

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2.—S in Brevier Roman denotes the section.

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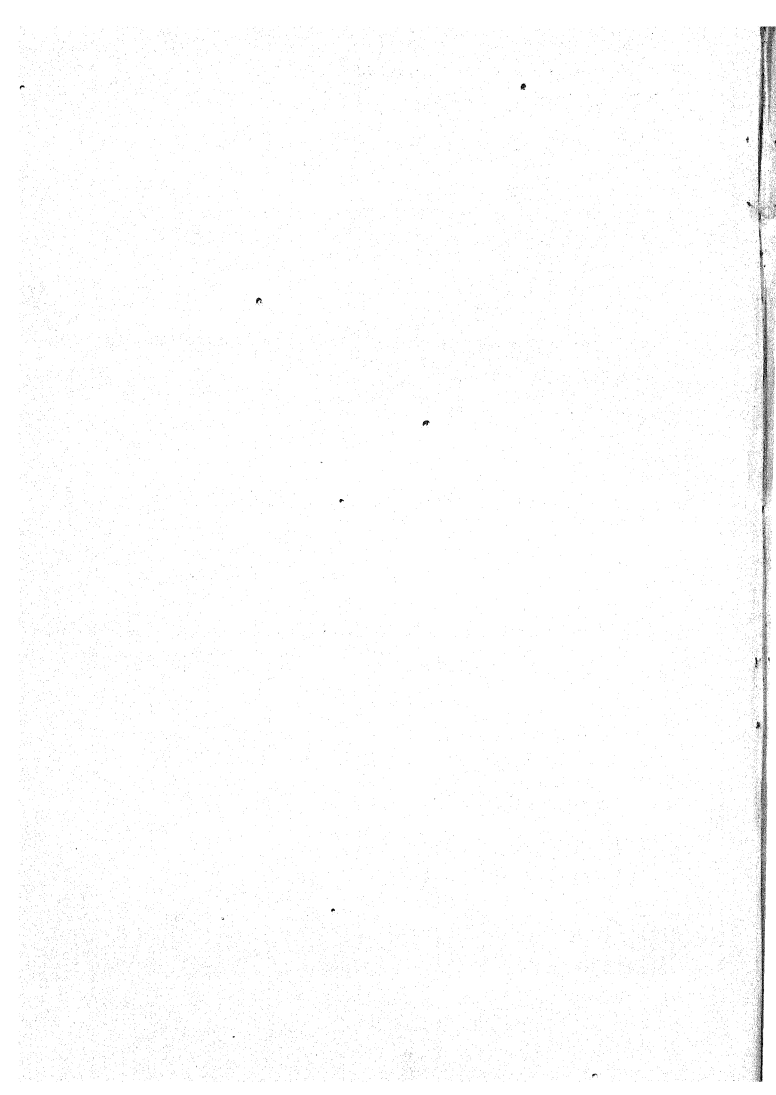
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THE
PRESIDENCY BANKS ACT

(ACT XI OF 1876)

(WITH THE CASE-LAW THEREON)

COMPILED AT
THE LAWYER'S COMPANION OFFICE, TRICHINOPOLY

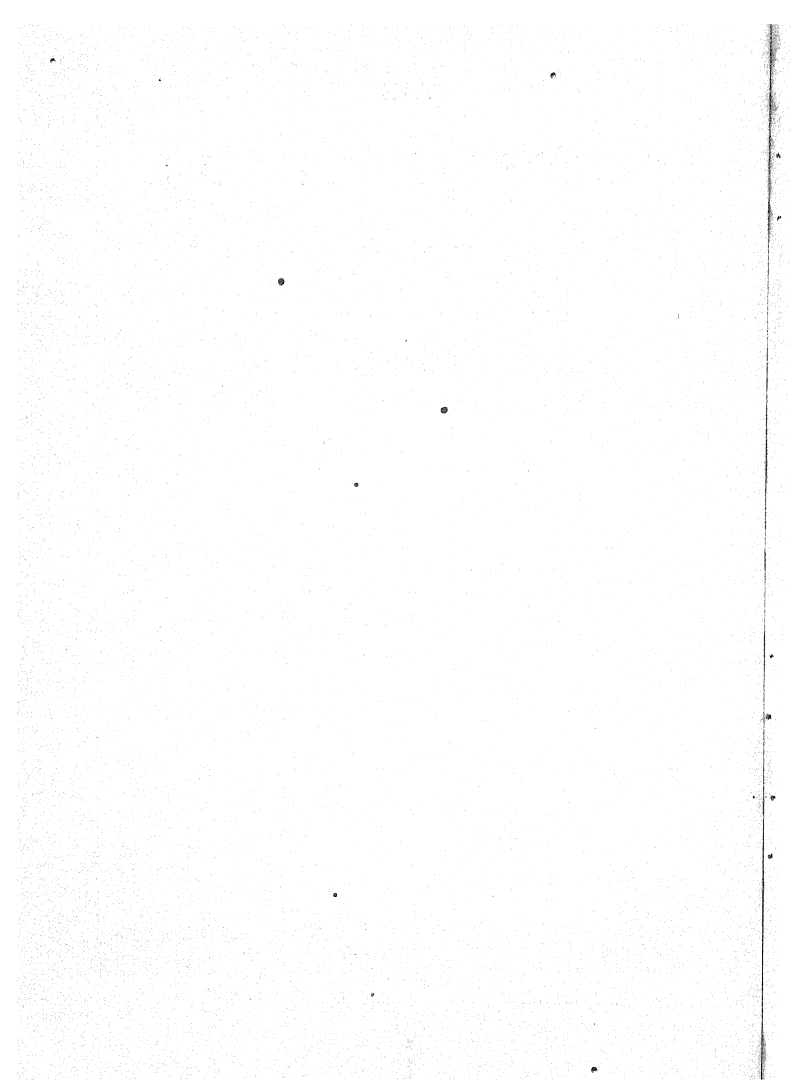
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THE PRESIDENCY BANKS ACT, 1876.¹

(ACT XI OF 1876.)

Passed on the 11th April, 1876.

HISTORICAL MEMOIR.

Year.	No. of Act.	Name of Act.	How affected.
1839	VI	Bank of Bengal	Rep., Act IV of 1862.
1840	III	Bank of Bombay	Do. Bom. Act X of 1863.
1843	IX	Bank of Madras	Do. Mad. Act V of 1862.
1854	XXI	Banks of Bengal, Madras & Bombay.	Do. Act IV of 1862, Mad Act V of 1862 and Bom. Act X of 1863 respectively.
1855	XXVII	Do. do.	Do. do.
1862	IV	Bank of Bengal	Rep., Act XI of 1876.
1862	V	Payment at Presidency Banks	Do. do.
1862	V	Bank of Madras	Do. Mad. Act VI of 1866.
	(Mad.)		
1862	VI	Annexing schedule to Act IV of 1862.	Do. Act XI of 1876.
1863	X	Bank of Bombay	Do.
	(Bom.)		
1863	XXIX	Receipts of Presidency Banks	Do.
1866	VI	Bank of Madras	Do.
	(Mad.)		
1870	XIX	Bank of Bengal	Do.
1876	XI	Presidency Banks	Rep. in part and amended, Act V of 1879. Amended, Act XX of 1899; Act I of 1907.

N.B.—*Vide* also schedule to this Act, *infra*.

An Act for constituting and regulating the Banks of Bengal, Madras and Bombay.

WHEREAS the Bank of Bengal is now constituted and regulated by Act IV of 1862 as amended by Acts VI
Preamble. of 1862 and XIX of 1870, and its capital consists of twenty-two millions of rupees, in shares of one thousand rupees each ;

And whereas the Bank of Madras is now constituted and regulated by Madras Act VI of 1866, as amended by Madras Act I of 1871, and its capital consists of five millions six hundred and twenty-five thousand rupees, in shares of one thousand rupees each ;

And whereas a Bank named the Bank of Bombay was constituted and regulated by Bombay Act X of 1863, as amended by Bombay Acts XV of 1866 and I of 1867; but such Bank has been wound up and the said Bombay Acts are now obsolete and should be expressly repealed;

X of 1866, And whereas on the tenth day of December, 1867, a Joint-Stock Banking Company was registered and incorporated at Bombay, by virtue of the Indian Companies Act, 1866², under the name of "The New Bank of Bombay, Limited," with a Memorandum of Association and Articles of Association then also registered, and prescribing the constitution and regulations for the management of such Bank;

And whereas the Government of India now holds two thousand two hundred shares in the said Bank of Bengal, and five hundred and sixty-two and a half shares in the said Bank of Madras; and, under the provisions of the said Act IV of 1862 and Madras Act VI of 1866, is bound to appoint, and has power to remove, certain of the directors of the said Banks of Bengal and Madras respectively, and has also power to give a proxy to any person whom the Governor-General in Council may appoint, to attend and vote at any meeting of the proprietors of each of the same Banks;

And whereas the Government of India has determined to sell its said shares and to surrender its said powers; and it is expedient to relieve the said Government from the said duty of appointing directors, and to repeal the said enactments and to consolidate such of them as relate to the said Banks of Bengal and Madras respectively with the changes rendered necessary or desirable by such sale, surrender and relief;

And whereas it is expedient to reduce the said capital of the Bank of Bengal by two millions of rupees and to reduce the said capital of the Bank of Madras by six hundred and twenty-five thousand rupees, and to divide the capital so reduced of each of the same Banks into shares of five hundred rupees each;

And whereas it is expedient that the said New Bank of Bombay, Limited, should be reconstituted and regulated, in manner in this Act provided, under the name of the Bank of Bombay; It is hereby enacted as follows:—

(Notes).

1.—“The Presidency Banks Act, 1876.”

(1) Statement of objects and reasons.

For ——— see Gazette of India, 1875, Pt. V, p. 289.

A

(2) Report of the select Committee.

For ——— see Gazette of India, 1876, Pt. V, p. 328.

B

(3) Proceedings in Council.

For ——— see Gazette of India, Supplement, 1875, pp. 1030 & 1057 and (*ibid.*), 1876, pp. 331, 335.

C

(4) Places where Act had been declared to be in force.

This Act has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874, to be in force in the following Scheduled Districts, *vis.*—

The District Hazaribagh, Lohardaga (now called the Ranch District), see Calcutta Gazette 1899, Pt. I, p. 44, and it then included the present District of Palama, (which was separated in 1894), and Pargana Dalbhum and the Kolhan in the District of Singbhum.

See Gazette of India, 1881, Pt. I, p. 504.

It has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), S. 4 and Sch. I.

D-E

(5) Legislative changes.

The following Acts have been repealed by this Act, S. 2 and Schedule.

Act VI of 1862, Act VI of 1862, Bombay Act X of 1863, Madras Act VI of 1866, Bombay Acts XV of 1866, I of 1867, Act XIX of 1870, Madras Act I of 1871.

F

2.—“The Indian Companies Act, 1866.”

N.B.—See now the Indian Companies Act, 1882.

CHAPTER I.

PRELIMINARY.

Short title. 1. This Act may be called the Presidency Banks Act, 1876 ;

Commencement. and it shall come into force on the first day of May, 1876.

Repeal of enactments. 2. On and from that day the Statute specified in the first part of the schedule hereto annexed shall be repealed to the extent mentioned in the third column thereof, and the Acts specified in the second, third and forth parts of the same schedule shall be wholly repealed. But all bye-laws and regulations made under any such Act, and then in force, shall, so far as they are consistent with this Act, be deemed to have been made hereunder.

X of 1866.

The references made in the Indian Companies Act, 1866, to the Bank of Bengal, the Bank of Madras and the Bank of Bombay, shall be deemed to be made respectively to the Bank of Bengal, the Bank of Madras and the Bank of Bombay as constituted by this Act.

Interpretation-
clause.

3. In this Act, unless there be something repugnant in the subject or context,—

“the Bank” means the Bank of Bengal, the Bank of Madras or the Bank of Bombay (as the case may be), as constituted and regulated by this Act :

“Capital.” “capital” means the capital for the time being of the Bank :

“Shares.” “shares” means the shares for the time being of the capital, and includes also half shares .

“capital stock” means that part of the capital into which wholly paid-up shares have been converted or consolidated, and in the case of the Bank of Bengal and the Bank of Madras includes the present consolidated stock of such Banks respectively :

“Registered.” “registered” means registered in the books of the Bank :

“Shareholders.” “shareholders” means the duly registered holders from time to time of the shares of the Bank :

“Proprietors.” “proprietors” means the duly registered holders from time to time of the capital stock of the Bank :

“Directors.” “directors” means the directors assembled for the purpose of performing any of their functions under this Act :

“board” means a meeting of the directors duly called and constituted, or, as the case may be, the directors assembled at a Board :

“Auditors” and “Secretary.” “auditors” and “secretary” mean those respective officers from time to time of the Bank, and “secretary” includes a secretary and treasurer and a deputy secretary :

“general meeting” means the meeting of proprietors or shareholders or both, held annually under section 49 ; it includes any adjourned holding thereof ;

“Special meeting” means a meeting of proprietors or shareholders or both, held for the transaction of some particular business specified in the notice convening the meeting; it includes any adjourned holding thereof :

“Special resolution,” means a resolution passed at a special meeting :

“Office,” means the office or principal office for the time being of the Bank :

“Goods,” includes also Bullion, wares and merchandise :

“Presidency of Fort St. George,” means the territories now under the Government of the Governor of Fort St. George in Council :

“Presidency of Bombay,” means the territories now under the Government of the Governor of Bombay in Council ; and

“Presidency of Fort William,” means all the territories in British India other than the Presidency of Fort St. George and the Presidency of Bombay.

CHAPTER II.

CONSTITUTION.

4. The several persons who, when this Act comes into force, are respectively the proprietors and shareholders of the said Bank of Bengal, Bank of Madras and New Bank of Bombay, Limited (hereinafter called the present Banks), or who shall at any time thereafter, by virtue of this or any other Act regulating the Bank, become proprietors or shareholders, shall continue and constitute and be bodies corporate with perpetual succession under the name,—

in the case of the proprietors and shareholders of the said Bank of Bengal—of “The Bank of Bengal,”

in the case of the proprietors and shareholders of the said Bank of Madras—of “The Bank of Madras,” and

in the case of the shareholders and proprietors of the said New Bank of Bombay, Limited— of “The Bank of Bombay,”

and shall respectively possess and enjoy all the rights, powers and immunities incident by law to a corporation aggregate ; subject,

nevertheless, to the provisions of this or any other Act for the time being in force regulating the Bank,

and, in particular, the proprietors of the Bank shall not be with limited liability. liable for its debts and engagements, and the shareholders of the Bank shall be so liable only to the extent of their shares not fully paid up.

The several persons who are then proprietors and shareholders of each of the present Banks of Bengal and Madras, or the executors or administrators of such proprietors and shareholders respectively, shall be entitled to be registered as proprietors and holders of a like quantity of stock and a proportionate number of shares¹, as is or are then registered in their names respectively, or in the names of the persons whom they represent respectively in the books of each of the said present Banks of Bengal and Madras, two shares in the Bank of Bengal as constituted by this Act being deemed equivalent to one share in the present Bank of Bengal; and two shares in the Bank of Madras as constituted by this Act being deemed equivalent to one share in the present Bank of Madras,

and the several persons who are then shareholders of the said New Bank of Bombay, Limited, or the executors or administrators of such shareholders respectively, shall be registered as holders of a like number of shares of the Bank of Bombay as constituted by this Act as are then registered in their names respectively, or in the names of the persons whom they represent respectively in the books of the said New Bank of Bombay, Limited; and all such shares upon which the sum of five hundred rupees has then been paid, shall be deemed to have been fully paid up.

(Note).

1.—“Entitled to be registered as proprietors.... shares.”

Certificate-holder under Act XXVII of 1860—Registration of proprietors of Bank Shares.

The mother of an infant holding a certificate under Act XXVII of 1860, to collect debts due to the infant's estate, having failed to obtain registration of her name under section 4 of Act XI of 1876 in respect of such shares, applied to the District Court to have the certificate amended by inserting a power to her to negotiate such shares, but the application was rejected. *Held* that the application had been legally rejected. 11 C.L.R. 274 = 8 C. 300.

The holder of a certificate under Act XXVII of 1860 is not entitled to registration under this section (*Ibid.*). G

5. All the property, moveable and immoveable, and all the securities, claims and demands, and the benefits of all agreements, of or to which the present Banks are or shall be respectively possessed or entitled, or which shall, or but for this Act might be, on the said first day of May 1876, or might at any time thereafter have been, due to, or claimed by, the said Banks respectively shall, by virtue of this Act, become vested in and devolve upon, and may be claimed, made and recovered by,—

in the case of the said Bank of Bengal,—the Bank of Bengal as constituted by this Act,

in the case of the said Bank of Madras,—the Bank of Madras as constituted by this Act, and

in the case of the said New Bank of Bombay, Limited,—the Bank of Bombay as constituted by this Act ;

and the Bank shall, from and after the said first day of May 1876, be liable and subject to all debts, claims and demands which shall then be due or claimable from, or which, but for this Act, might be then, or might at any time thereafter, have been due or claimable from or made against the said Bank of Bengal, Bank of Madras or New Bank of Bombay, Limited, as the case may be,

and no suit or legal proceeding then pending by or against the said Bank of Bengal, Bank of Madras or New Bank of Bombay, Limited, shall cease, or abate, or become defective, in consequence of this Act, but may be continued and prosecuted by or against the Bank.

6. The transfer of the assets and liabilities of the said New Bank of Bombay, Limited, to the Bank of Bombay by virtue of this Act, shall operate as a winding-up and liquidation of the said New Bank of Bombay, Limited.

No shareholder or creditor of the said New Bank of Bombay, Limited, shall take any proceedings for winding-up the same under the Indian Companies Act, 1866¹, or any Act for the time being in force relating to the winding-up of Companies ;

and no person shall make, assert or take any claims, demands or proceedings against the same Bank, or the directors or officers thereof, except so far as may be necessary for enforcing the provisions of this or any other Act for the time being in force regulating the Bank of Bombay.

(Note).

1.—“*The Indian Companies Act, 1866.*”

N.B.—See now the Indian Companies Act, 1882.

G-1

Banks to sue and
be sued in corporate
name,and use corporate
seals, and may hold
any transfer prop-
erty.7. The Bank shall sue and be sued by its
said corporate name ;and shall use such corporate seal as the direc-
tors from time to time appoint ;

and may as such body corporate acquire and hold, either abso-
lutely or conditionally, for a term or in perpetuity, any property
whatsoever, moveable or immoveable, and transfer, assign and con-
vey the same.

8. The seal of the Bank shall not be affixed to any instrument
except in the presence of at least two directors
and of the Secretary and Treasurer, who shall
sign their names to the instrument in token of
their presence, and such signing shall be independent of the signing
of any person who may sign the instrument as a witness.

Unless so signed as aforesaid, such instrument shall be of no
validity.

Contracts how
made.9. Contracts may be made on behalf of the
Bank as follows :—

- (a) any contract, which, if made between private persons,
would be by law required to be in writing, and, if made
according to English law, to be under seal, may be
made on behalf of the Bank in writing under its corpo-
rate seal, and such contract may be in the same manner
varied or discharged ;
- (b) any contract, which, if made between private persons,
would be by law required to be in writing signed by the
parties to be charged therewith, may be made on behalf
of the Bank by writing signed by any person acting
under the express or implied authority of the Bank, and
such contract may in the same manner be varied and
discharged ;
- (c) any contract, which, if made between private persons,
would by law be valid, although made by parol only and
not reduced into writing, may be made by parol on
behalf of the Bank by any person acting under the
express or implied authority of the Bank, and such con-
tract may in the same manner be varied and discharged ;

and all contracts made according to the provisions herein contained shall be effectual in law and shall be binding upon the Bank and other parties thereto and their legal representatives :—

CHAPTER III.

CAPITAL.

10. The capital of the Bank of Bengal shall consist of twenty millions of rupees in shares of five hundred rupees each, divisible into half shares, with power to increase the same, in manner hereinafter provided

Capital of Bank of Bengal.

* * * *

The capital of the Bank of Madras shall consist of five millions of rupees, in shares of five hundred rupees each, divisible into half shares, with power to increase the same, in manner hereinafter provided * *.

Capital of Bank of Madras.

The capital of the Bank of Bombay shall consist of ten millions of rupees, in shares of five hundred rupees each, divisible into half shares, with power to increase the same, in manner hereinafter provided * *.

Capital of Bank of Bombay.

(Note).

Legislative change.

The words "to thirty millions of rupees" at the end of the first para, "to twelve millions of rupees" at the end of the second para, and "to twenty millions of rupees" at the end of the third para, in the section were repealed by the Presidency Banks (Amendment) Act, 1907 (I of 1907), S. 2. H

11. The capital of the said New Bank of Bombay, Limited, already created, shall, on the first day of May, 1876, constitute the capital of the Bank of Bombay, subject to be increased as aforesaid.

Capital of New Bank of Bombay, Limited, to be capital of Bank of Bombay.

12. Any shareholder may from time to time surrender his wholly paid-up shares, or any of them, to the directors, and demand and receive from the Bank, in lieu thereof, capital stock to the amount represented by the shares so surrendered,

Surrender of paid-up shares for stock.

and any proprietor may from time to time surrender his stock, or any portion thereof, to the directors, and demand and receive from the Bank, in lieu thereof, shares to the like amount, or as near thereto as practicable.

Surrender of stock for shares.

13. The proprietors and shareholders of the Bank may from time to time by special resolution and with the previous sanction of the Governor-General in Council increase or reduce the capital of the Bank :

Power to increase or reduce capital.

Provided that no such special resolution shall be deemed to have been passed, unless at least one-third in number of the proprietors or shareholders, holding at least one-half of the paid-up capital of the Bank for the time being, be present in person or by proxy, and a majority poll by open voting in favour of the said resolution.

14. When any such special resolution to increase the capital has been passed, the directors may, subject to the provisions of this or any other Act for the time being in force regulating such Bank, and to the special direction (if any) given in reference thereto by the meeting at which such resolution has been passed,—

Procedure on resolution to increase capital.

- (a) make such orders as they think fit for the opening of subscriptions towards such increase of capital by the proprietors and shareholders ;
- (b) allow to the proprietors and shareholders such period to fill up the subscription as to the directors seem fit ;
- (c) prescribe the manner in which the proprietors and shareholders shall subscribe and pay into the Bank the proportions of new capital which they may respectively desire to subscribe ; and
- (d) make such orders as the directors think fit for the disposal and allotment of the amount of new capital that may not be subscribed for and paid up in manner aforesaid.

* * * * *

(Note).

Legislative change.

The following proviso at the end of this section was repealed by the Presidency Banks Amendment Act, 1907 (I of 1907), S. 2—

“ Provided that the capital shall not exceed, in the case of the Bank of Bengal thirty millions of rupees, in the case of the Bank of Madras, twelve millions of rupees, and in the case of the Bank of Bombay twenty millions of rupees.”

I

Procedure on resolution to reduce capital.

15. When any such special resolution to reduce the capital has been passed, the directors may (subject as aforesaid) prescribe the manner in which the reduction shall be carried into effect.

New capital to be subject to provisions of Act.

16. Any new capital created under the provisions of section 13 shall be subject to the provisions of this or any other Act regulating the Bank in force for the time being.

CHAPTER IV.

FORFEITURE OF STOCK AND SHARES.

Powers in regard to proprietors or shareholders indebted to Bank¹.

17. If any proprietor or shareholder is indebted to the Bank, the Bank may withhold payment of the dividends on the stock or shares of such proprietor or shareholder not being registered as held in trust, or as executor or administrator, and apply them in payment of the debt ;

and the Bank may refuse to register the transfer of any such stock or shares until payment of such debt ;

and after demand and default of payment, and notice in that behalf given to such proprietor or shareholder, or his constituted agent, or by public advertisement in the Local Official Gazette, if the debt remain unpaid for the space of three months after such notice, the Bank may advertise in the Local Official Gazette such stock or shares for sale on a day not less than fifteen days from the publication of such advertisement ;

and may, on such day, sell by public auction, and subject to such conditions, if any, as the Bank thinks fit, such stock or shares, or so much or so many thereof as may be necessary and apply the proceeds thereof in or towards payment of the said debt, with interest, from the day appointed for the payment of such debt to the time of actual payment, at such rate as may have been agreed upon, or, in the absence of such agreement, at the highest rate current for advances by way of local discounts by the Bank ;

and shall pay over the surplus, if any, to such proprietor or shareholder or to his lawful representative.

(Notes).

1.—“ Powers in regard . . . to Bank.”

Section refers only to debts presently payable—Refusal to transfer.

- (a) The language and the evident intention of S. 17 point to a present debt only as conferring a right upon the Bank to refuse either to register a transfer or to pay dividends. 1 C.L.R. 507, (513) = 3 C. 392. J
- (b) This view is strongly fortified by the English case of the *Stockton Mal-leable Iron Co.*, 2 Ch. D. 101, in which it was held that the words “due” and “indebted” in the Articles of Association of a Trading

1.—“Powers in regard... to Banks”—(Concluded).

Company, which gave to the Company a lien upon shares similar to that given by this Act to the defendant, must be taken to refer to debts presently payable. (*Ibid.*) K

- (c) In order to entitle a plaintiff to a mandatory order directing the Bank of Bengal to register a transfer, the plaintiff must show that he applied for such registration at a time and under circumstances when the Bank was enabled and bound to comply with the request. An application made during a time when, in accordance with Act XI of 1876, S. 20, the transfer books are closed, has no more effect than if it had never been made. (*Ibid.*) L

CHAPTER V¹.

CERTIFICATES, TRANSFER AND TRANSMISSION OF SHARES AND STOCK.

(Note).

1.—“Chapter V.”

Scope of this Chapter.

Chapter V of the Act deals with certificates and the transfer and transmission of shares and provides a change in the legal title to shares in three ways, (a) by transfer by the Act of the shareholder, (b) by survivorship, and (c) by transmission on death, insolvency or bankruptcy or (in the case of a female member) on marriage. (See Ss. 20, 22 and 23 of this Act). 2 Bom. L.R. 467, (473). M

18. Every shareholder shall be entitled to a certificate, under Certificates for the corporate seal of the Bank, and signed by two shares. directors and the Secretary and Treasurer, specifying the shares held by him, and in the case of shares which are not wholly paid up, the amount paid thereon,

and any holder of more than one-half share, may, at his option, demand a certificate for each such half share, or one or more certificates for all or any of such half shares, and such certificate or certificates shall be delivered to him accordingly: Provided that the number of such certificates shall in no case exceed the number of half shares in respect of which they are so delivered.

Every proprietor of capital stock shall be entitled to a receipt signed by two directors and the Secretary and Treasurer, and specifying the amount of stock held by him, and any such proprietor may, at his option, demand one receipt for the whole of the stock, or separate receipts for any portions of the stock, so held by him, and such receipt or receipts shall be delivered to him accordingly: Provided that no receipt shall be delivered for a portion of stock less than two hundred and fifty rupees.

For every certificate and receipt delivered under this section there shall be paid such fee as may for the time being be prescribed under section 63, clause (k) : Provided that no fee shall be payable for certificates or receipts delivered to the persons referred to in section 4 for shares in or stock of the Bank.

Fees for certificates and receipts to be evidence.

Every such certificate and receipt shall be *prima facie* evidence of the title of the shareholder or proprietor to the shares or stock therein specified.

19. The stock and shares of every proprietor and shareholders shall be moveable property, capable of being transferred in manner provided by the regulations contained therein, or in any other Act regulating the Bank for the time being in force, and shall not be of the nature of immoveable property ; and each share shall be distinguished by its appropriate number.

Stock and shares to be moveable property.

20. Every transfer of stock or shares may be by endorsement on the certificate or in such other form as the board from time to time may approve, and shall be presented to the Bank of accompanied by such evidence as the board may require to prove the title of the transferor.

Form of transfer to be approved by Board.

Every such transfer shall be verified in such manner as the board require, and the board may refuse to register any such transfer until the same be so verified, and, in the case of shares not fully paid up, unless the transferee is approved by the board.

Board may require evidence of transmission.

The transferor shall be deemed to remain the proprietor or holder of the stock or shares transferred until the name of the transferee is registered in respect thereof.

Transferor to remain proprietor till transfer registered.

21. The directors may from time to time close the register and transfer-books¹, of the Bank for any period or periods not exceeding in the whole thirty days in any twelve consecutive months.

Power to close transfer-books.

(Note).

1.—“ The directors . . . transfer-books.”

Application made when transfer-books are closed.

An application made during a time when, in accordance with this section, the transfer-books are closed, has no more effect than if it had never been made, 8 C. 392=1 C.L.R. 507.

N

Corporation to consist of registered proprietors or shareholders only.

22. The proprietors and shareholders for the time being, and no other persons, shall be members respectively of the bodies corporate hereby constituted,

and, except for the purpose of excluding the provisions of section 17, the Bank shall not be bound or affected by notice of any trust to which any stock or share may be subject in the hands of the proprietor or holder¹ thereof;

and when any stock or share is vested in more than one proprietor or holder, such proprietors or shareholders shall, as between themselves and the Bank, be considered as joint owners with benefit of survivorship:

Provided that, as regards voting at meetings, service of notices, and receipt of dividend, the person whose name stands first in the register as one of the proprietors or holder of such stock or shares shall be deemed the sole proprietor or holder thereof.

(Notes).

1.—“The proprietors...or holder.”

Scope of the Section—Notice of trust.

- (a) This section provides that the shareholders for the time being and no other person shall be members of the bank and that the bank shall not (subject to an exception not now material), be bound or affected even by notice of any trust to which the share may be subject in the hands of the holder. 2 Bom. L.R. 467 (473)=24 B. 350. O
- (b) This provision, it will be noticed in passing, goes further than S. 29 of the Indian Companies Act of 1882. (*Ibid.*) (474)=24 B. 350. P
- (c) The effect of S. 22, is that a share as between the Bank and all who may be interested in it, is the exclusive and separate property of the registered shareholder. (*Ibid.*) Q
- (d) This result, it should be noted arises not out of mere contracted obligation, but out of a provision of the legislative force capable of moulding the rights of individuals in a form not otherwise possible by mere contract. (*Ibid.*) R
- (e) It was argued that on the death of a shareholder the provisions of S. 22 come to an abrupt end but this appears to be putting a very narrow construction on the words. (*Ibid.*) S
- (f) The Court preferred to take the view expressed by James, L.J., in *Baird's case* L.R. 5 Ch. 135, where he says: the dead shareholder remains that is his estate remains—a member,” and said that, until there is such a transmission as the Act sanctions, the deceased holder must be treated as the shareholder for the time being, and the share must be deemed to be in his hands as the holder thereof, so that the Bank is not bound or affected by notice of any trust relating to the share. (*Ibid.*) T

23. When by the death of any proprietor or shareholder his stock or shares shall devolve on his legal representative, the Bank shall not be bound to recognize¹, any legal representative of such proprietor or shareholder, other than a person who has taken out from a Court having jurisdiction in this behalf probate of the will or letters of administration to the estate of the deceased.

Any person becoming entitled to stock or shares in consequence of the insolvency or bankruptcy of any proprietor or shareholder, or in consequence of the marriage of any female proprietor or shareholder, may be registered as a proprietor or shareholder upon such evidence being produced as the directors may from time to time require.

Transmission of stock or shares of deceased proprietors or shareholders.

(Notes).

1. — "When by the death . . . to recognize."

Shares, transfer of—Survivorship—Joint Hindu Family—Probate or letters of administration, necessity of producing.

(a) The sole surviving coparcener of a deceased Hindu cannot require a Bank incorporated under this Act to register him, by reason of his survivorship, as a shareholder in respect of shares in the Bank, which stand in the name of his deceased co-parcener, without the production of probate or letters of administration to the will or estate of the deceased. 2 Bom. L.R. 467 = 24 B. 350. U

(b) Survivorship under the Act takes place when the share is vested in more than one holder; for in that case the shareholders shall, as between themselves and the Bank, be considered as joint owners with benefit of survivorship. But a share is only vested in holders when they are duly registered in the books of the Bank as the holders of that share. (Ibid). V

CHAPTER VI.

DIRECTORS.

24. The business of the Bank shall be managed by the board, which shall in the first instance consist of six directors, and may subsequently consist of such number, not less than six, and not more than nine, as may be fixed by a special resolution.

Such directors shall be selected by vote of a general or special meeting.

Quorum.

Three of the directors shall form a quorum for the transaction of business.

Board.

25. The persons who, on the first day of May 1876, are respectively directors of the Bank of Bengal, the Bank of Madras, and the New Bank of Bombay, Limited, shall be respectively directors of the Bank of Bengal, the Bank of Madras, and the Bank of Bombay, as constituted by this Act, subject to removal as hereinafter provided and to the other provisions herein contained.

26. The two directors who have been longest in office shall go out of office at the general meeting.

Any director so retiring may be re-elected at such meeting; and if any question arise as to which of the directors who have been the same time in office shall retire, such question shall be decided by the directors by ballot.

27. *Clause 1.*—No person shall be qualified to serve as a director of a Bank who is not a proprietor or holder in his own right of unencumbered stock or shares of such Bank, to the nominal amount of ten thousand rupees at the least,

Clause 2.—No person shall be qualified to serve as a director—

if he holds the office of director, provisional director, promoter, agent or manager of any other joint-stock Bank established, or having a branch or agency, in British India, or advertised as about to be established, or to have a branch or agency, in British India; or

if he is a salaried officer of Government not specially authorized by the Governor-General in Council to serve as a director;

and the office of director shall be vacated—

if the person holding it resigns his office or dies;

if he accepts or holds any other office of profit under the Bank;

if he becomes insolvent or bankrupt, or compounds with his creditors;

if he is declared lunatic, or becomes of unsound mind;

if he is absent from the board for more than three consecutive months;

if he ceases to hold in his own right the amount or number of unencumbered stock or shares required to qualify him for the office.

Clause 3.—No two persons who are partners of the same mercantile firm, or one of whom is the general agent of, or holds a power of procuration from, the other, or from a mercantile firm of which the other is a partner, shall be eligible or qualified to serve as directors at the same time.

Co-partners of same firm not to serve as directors at same time.

Clause 4.—The proprietors or shareholders may, by a special resolution passed by the votes of proprietors or shareholders holding in the aggregate not less than one-half of the capital, remove any director before the expiration of his period of office, and appoint in his stead a qualified person, who shall in all respects stand in his place.

Power to remove directors.

28. At the first meeting of the directors in every year, they shall choose a president and vice-president from among themselves, and whenever the office of president or vice-president becomes vacant, they shall, at their next meeting, choose a successor for the remainder of the current year :

Directors to choose president and vice-president.

[Provided that no person shall be chosen to be president or vice-president twice in succession.]

The president, or in his absence the vice-president, shall be chairman at all meetings whether of directors or of proprietors or shareholders, or of proprietors and shareholders, and shall have an additional or casting vote in all cases of an equal division of votes : Provided that if both the president and vice-president be absent at any meeting, the directors present shall elect a chairman for such meeting from among themselves, and such chairman shall, in case of an equal division of votes, have an additional or casting vote.

Chairman.

Casting vote.

(Notes).

Legislative change.

The proviso after the first para of this section was added by Presidency Banks Act, V of 1879, S. 2. W

1.—“ Casting vote.”

Casting vote.

The Chairman has usually a casting vote. Evans and Cooper, p. 76. X

Vacancies among
directors how filled
up.

29. The board shall have power at any time, and from time to time, to supply any vacancies in their number arising from the death, resignation or disqualification, under section 27, of any director.

Any director so appointed shall, for the purposes of section 26, be considered to have held office from the date on which the director in whose place he is appointed was elected, or (where such director was appointed under this section) from the date on which his mediate or immediate predecessor was elected.

Acts of directors
valid notwithstanding
subsequent discovery
of disqualification.

30. All acts done by any person acting in good faith as a director shall be as valid ¹ as if he was a director, notwithstanding it be afterwards discovered ² that there was some defect in his appointment or qualification.

(Notes).

1.—“As valid.”

(1) Scope of section.

While the section in proper circumstances validates the man's act as if he held the office, it does not validate his tenure of the office, *e.g.*, so as to entitle him to the remuneration attached to it. *E. P. Birkenshaw*, (1904), 2 K.B. 327. Y

(2) Invalid appointments of directors, etc.—Validity of their acts.

(a) Outsiders are bound to know what Lord Hatherly called the “external position of the company;” but are not bound to know its “indoor management.” *Mahony v. East Holyford Co.*, L.R. 7 H.L. 869 (893). Z

(b) If persons are held out as, and act as directors, and the shareholders do not prevent them from so doing, outsiders are entitled to assume that they are directors, and, as between the Bank and such outsiders, the acts of such directors *de facto* will bind the Bank. (*Ibid.*) *Cf. County of Gloucester Bank v. Rudry*, (1895), 1 Ch. 639. A

(c) Bankers who received from the Bank's offices a formal notice signed by the “Secretary” that they were to pay cheques signed by “either two of the following three directors,” and who paid cheques accordingly, were discharged, although no directors or secretary had ever been appointed. (*Ibid.*) B

(d) As against the director himself this section may render his acts as director valid. *York Tramways Co. v. Willows*, 8 Q.B.Div. 685. C

(e) If absence of notice to the contrary be rightly taken to be of the essence, it follows, as has been held, that while the saving clause applies to acts done before the invalidity of the appointment is shown (*Hallows v. Fernie*, 3 Ch. 467, 473) yet when a defect has been discovered, it does not give validity to subsequent acts. *Bridport Old Brewery Co.* 2 Ch. 191. D

2.—“Afterwards discovered.”

Subsequent discovery.

The subsequent discovery referred to is not a discovery of the facts, but a discovery that the facts constitute a defect. *British Asbestos Co. v. Boyd*, (1908), 2 Ch. 439. E

31. Every director shall be indemnified by the Bank against all losses and expenses incurred by him in or about the discharge of his duties, except such as happen from his own wilful act or default.

Indemnity of directors.

No director shall be responsible for any other director or for any officer, clerk or servant of the Bank, or for any loss or expense happening to the Bank by the insufficiency or deficiency of value of, or title to, any property or security acquired or taken on behalf of the Bank, or by the insolvency, bankruptcy or wrongful act of any customer or debtor of the Bank, or by anything done in the execution of the duties of his office or in relation thereto, or otherwise than for his own wilful act or default.

CHAPTER VII.

OFFICERS OF THE BANK.

Appointment,
salaries, suspension
and removal of
officers.

32. The directors shall have power—

to appoint such officers, clerks and servants as may be necessary to conduct the business of the Bank,

to grant salaries, pensions and other emoluments to such officers, clerks and servants, and

to suspend or remove any officer, clerk or servant of the Bank.

33. The Secretary and such other officers of the Bank as the directors may by writing notify in the local official Gazette (and, in the case of the Bank of Bengal, also in the Gazette of India) are hereby severally empowered for and on behalf of the Bank to endorse and transfer promissory notes, stock-receipts, stock, debentures, shares, securities and documents of title to goods, standing in the name of, or held by, the Bank,

Accounts, receipts and documents of Bank by whom to be signed.

and to draw, accept and endorse bills of exchange, bank post-bills, and letters of credit, in the current and authorised business of the Bank,

and to sign all other accounts, receipts and documents connected with such business.

Officers forbidden to engage in other commercial business.

34. No Secretary, inspector, manager or accountant in the service of the Bank,

and [without the previous sanction of the board] no khazanchi, cashier or shroff in the service of the Bank at the principal office,

and, without the previous sanction of the board, no agent, khazanchi, cashier or shroff at any branch or agency of the Bank,

shall engage in any other banking or commercial business, either on his own account or as agent for any other person or persons, or shall act as broker or agent for the sale or purchase of Government or other securities.

(Notes).

Legislative change.

The words "without the previous sanction of the board," in this section were inserted by the Presidency Banks Act V of 1879, S. 3. F

35. Every person appointed to hold, or act in, any one or more of the said offices, and every other officer from whom the directors may from time to time think fit to require it, shall give security to the directors, for the faithful discharge of his duty to the satisfaction of the directors, in such amount and in such manner as they think proper.

The security to be given as aforesaid by the person holding or acting in the office of secretary shall not be in a less amount than fifty thousand rupees.

CHAPTER VIII.

BUSINESS.

36. The Bank is authorised to carry on and transact the several kinds of business hereinafter specified (that is to say):

Business which banks may transact.

(a) the advancing and lending money², and opening cash credits, upon the security of—

(1) promissory notes, debentures, stock and other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland [and, in the case of the Bank of Madras, securities of the Government of Ceylon];

(2) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India;

- (3) stock or debentures of, or shares in, Railway or other Companies, the interest whereon shall have been guaranteed by the Secretary of State for India in Council [or such securities issued by State-aided railways as the Governor-General in Council may from time to time prescribe] ;
- (4) debentures or other securities for money issued by, or on behalf of, any municipal body [or any district board], [or any body of Commissioners for making improvements in any port or of trustees of any port] under the authority of any Act of a legislature established in British India [or the Trustees for the Improvement of the City of Bombay under the authority of the City of Bombay Improvement Act, Bom. Act IV of 1898. 1898] ;
- (5) bullion or other goods which, or the documents of title to which, are deposited with, or assigned to, the Bank as security for such advances, loans or credits ; and
- (6) accepted bills of exchange and promissory notes indorsed by the payees [and joint and several promissory notes of two or more persons or firms unconnected with each other in general partnership] :

Provided that such advances and loans may be made, if the directors think fit, to the Secretary of State for India in Council, without any specific security ;

- (b) the selling and realization of the proceeds of sale of any such promissory notes, debentures, stock-receipts, bonds, annuities, stock, shares, securities, bullion or goods which, or the documents of title to which, have been deposited with, or assigned to, the Bank as security for such advances, loans or credits, or which are held by the Bank, or over which the Bank is entitled to any lien or charge in respect of any such loan or advance or credit or any debt or claim of the Bank, and which have not been redeemed in due time in accordance with the terms and conditions (if any) of such deposit or assignment ;

[(bb) the advancing and lending money to Courts of Wards upon the security of estates in their charge or under their superintendence and the realisation of such advances or loans and any interest due thereon, provided that no such advance or loan shall be made without the previous sanction of the Local Government concerned and that the period for which any such advance or loan is made shall not exceed six months ;]

(c) the drawing, discounting, buying and selling of bills of exchange and other negotiable securities payable in India, or * * * in Ceylon ;

(d) the investing of the funds of the Bank upon any of the securities specified in paragraph (a) of this section, clauses (1), (2), (3) and (4), and converting the same into money when required,

and from time to time altering, converting and transposing such investments for or into others of the investments above specified;

[Provided that—

(1) the power of investing in the securities of the Government of Ceylon shall extend only to the Bank of Madras, and

(2) the total of the assets held at any time by the Bank of Madras either upon the security of, or invested in, securities of the Government of Ceylon in accordance with the authority conferred by paragraph (a), clause (1), or this paragraph, shall not exceed the sum of the deposits held and balances of cash accounts at credit at the Ceylon Branch of the said Bank of Madras ;]

(e) the making, issuing and circulating of bank-post-bills and letters of credit made payable in India, or * * * in Ceylon, to order, or otherwise than to the bearer on demand ;

(f) the buying and selling of gold and silver, whether coined or uncoined ;

(g) the receiving of deposits and keeping cash accounts on such terms as may be agreed on ;

(h) the acceptance of the charge and management of plate, jewels, title-deeds or other valuable goods on such terms as may be agreed upon ;

- (i) the selling and realising of all property, whether moveable or immoveable, which may, in any way, come into the possession of the Bank in satisfaction or part satisfaction of any of its claims ;
- (j) the transacting of pecuniary agency business on commission ;
- (k) the acting as agent on commission in the transaction of the following kinds of business (namely) :—
 - (1) the buying, selling, transferring and taking charge of any securities, or any shares in any public Company ;
 - (2) the receiving of the proceeds, whether principal, interest or dividends, of any securities or shares ;
 - (3) the remittance of such proceeds at the risk of the principal by public or private bills of exchange, payable either in India or elsewhere ;
- (l) the drawing of bills of exchange, and the granting of letters of credit payable out of India, for the use of principals for the purpose of the remittances mentioned in the last proceeding clause of this section ;
- (m) the buying, for the purpose of meeting such bills or letters of credit, of bills of exchange payable out of India, at any usance not exceeding six months ;
- [(mm) the borrowing of money in India for the purposes of the Bank's business, and the giving of security for money so borrowed by pledging assets or otherwise ;]
- (n) and, generally, the doing of all such matters and things as may be incidental or subsidiary to the transacting of the various kinds of business hereinbefore specified.
- (o) it shall also be lawful for the Bank under any arrangement or agreement with the Secretary of State for India in Council—
 - (1) to act as banker for and to pay, receive, collect and remit money, bullion and securities on behalf of the Government ;
 - (2) to undertake and transact any other business which the Government may, from time to time, entrust to the Bank.

And the directors shall have power from time to time to arrange and settle with the Governor-General in Council the terms of remuneration on which such business shall be undertaken by the Bank, and also as to the examination and audit from time to time of the accounts and affairs of the Bank by or on behalf of the Governor-General in Council.

(Notes).

Legislative changes.

- (1) The following were added by the Presidency Banks (Amendment) Act, 1907 (I of 1907), Ss. 3 (i) (ii) (iii) (iv) (vi) : The words "and, in the case of the Bank of Madras, securities of the Government of Ceylon" in (a) (1);
the words "or such securities issued by State-aided Railway as the Governor-General in Council may from time to time prescribe" in (a) (3);
the words "or any district board" in (a) (4);
the words "and joint and several promissory notes of two or more persons or forms unconnected with each other in general partnership" in (a) (6); paragraph (bb) and the proviso to paragraph (d).
- (2) The following were added by the Presidency Banks Act, 1879 (V of 1879), S. 4;
The words "or any body of commissioners for making improvement in any port or of trustees of any port" in (a) (4); and paragraph (mm).
- (3) The following were added by the Presidency Banks Act, 1899 (XX of 1899) S. 2;
The words "or the Trustees for the improvement of the City of Bombay under the authority of City of Bombay Improvement Act, 1898" in (a) (4).
- (4) The following were repealed by the Presidency Bank Act, 1879 (V of 1879);
The words "in the case of the Bank of Madras" in (c) and (e),

G-Z

1.—"Business which Bank may transact."

(1) Bank of Bombay—Transaction of business.

The Bank of Bombay is regulated by the Presidency Banks Act, 1876, and under it the Bank is authorised to carry on and transact the business of discounting and buying Bills of Exchange and other negotiable securities payable in India. 2 Bom. L. R. 808=25 B. 52. A

(2) Scope of section.

Section 36 merely specifies the several kinds of authorised business: it does not enumerate all the incidental details. 2 Bom. L.R. 803 (806). B

2.—"The advancing and lending money."

Taking a charge on immoveable property.

— for an existing loan is not illegal. 25 B. 522=2 Bom. L. R. 803. C

Business which
Banks may not
transact.

37. The directors shall not transact any kind of banking business other than those above specified, and in particular they shall not make any loan or advance—

- (a) for a longer period than [six months] or
- (b) upon the security of stock or shares of the Bank of which they are directors ; or
- (c) [save in the case of the estates specified in section 36, paragraph (bb)], upon mortgage, or in any other manner upon the security, of any immoveable property² or the documents of title relating thereto ;
- (d) [nor shall they (except upon the security mentioned in section 36, paragraph (a), Nos. 1 to 5 inclusive)—
discount bills for any individual or partnership firm for an amount exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force, or
lend or advance in any way to any individual or partnership-firm an amount exceeding in the whole at any one time such sum as may be so prescribed ;]
- (e) nor shall they discount or buy, or advance and lend, or open cash-credits on the security of any negotiable instrument of any individual or partnership-firm, payable in the town or at the place where it is presented for discount, which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership ;
- (f) nor shall they discount or buy, or advance and lend, or open cash-credits on the security of any negotiable security having at the date of the proposed transaction a longer period to run than [six months] or, if drawn after sight, drawn for a longer period than [six months].

* * * *

Nothing contained in this Act shall be deemed to prevent the directors from allowing any person who keeps an Overdrawing. account with the Bank [to overdraw] such account, without security, to the extent of [such sums not exceeding at one time ten thousand rupees in the whole as may be prescribed for the time being by the bye-laws made under this Act].

(Notes).

Legislative changes.

- (1) The words "six months" in this section were substituted for "three months" by the Presidency Banks (Amendment) Act, 1907 (I of 1907), S. 4 (i) (iii) ;

- (2) The words "save in the case of the estates specified in section 36, paragraph (b)" in clause (c) were prefixed by S. 4 (ii) of the same Act ;
- (3) Clause (d) was substituted by the Presidency Banks Act, 1879 (V of 1879), S. 5, for the following :—

"Nor shall they lend or advance, by discount of bills or otherwise, to any individual or partnership firm except [upon the security mentioned in section 36, paragraph (a), numbers (1) to (5) inclusive]. any sums of money exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force."

- (4) The following proviso to clause (f) :—"Provided that in the case of the Bank of Madras, the Directors may discount negotiable securities payable in Ceylon having at the date of the transaction a period to run not exceeding four months," was repealed by the Presidency Banks (Amendment) Act, 1907 (I of 1907), S. 4 (iii).
- (5) The words "to overdraw" and the words "such sum not exceeding at one time ten thousand rupees in the whole, as may be prescribed for the time being by the bye-laws under this Act" in the last para were substituted respectively for "from overdrawing" and "sums not exceeding at any one time two thousand rupees in the whole" by the Presidency Banks (Amendment) Act, 1907 (I of 1907), S. 4 (iv).

1.—"Business which Banks may not transact."

Scope of section—Restriction on Directors.

- (a) It must be noticed that the expressed restriction contained in section 37 is on making any loan or advance upon mortgage of immoveable property and that the words of that section impose that restriction not on the Bank but on its Directors. 2 Bom. L.R. 803 (806)=25 B. 52.H
- (b) Reading through the whole of section 37 it appears that it is concerned with the mode in which the Directors were to conduct the business in the interest of the Bank and did not impose the prohibition in obedience to any principle of public policy dictated by the public interest. Thus it can hardly be supposed that a loan or advance in breach of the conditions indicated in sub-sections (d) or (e) would leave the Bank without remedy and at the same time sub-section (b) is strongly suggestive of the view that section 37 merely lays down rules for the guidance of the Bank, and that it is outside its scheme that the non-observance of those rules should prejudice the interests of the Bank or that what is designed for its protection should act to its prejudice. 2 Bom. L.R. 803 (808)=25 B. 52. I
- (c) In this connection reference may be made to the language of Lord Selborne in the *G.E.Ry. Co. v. Turner*, L.R.8 Ch. D. 152: "True it is that the investment was an unauthorised investment, but I entirely assent to what was said by Sir Richard Bagallay, that there is no difference between an unauthorized investment of the money belonging to a public company by its trustees and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of *cestuis que trust* has been laid out in an unauthorized manner, that therefore they are not to have the benefit of whatever value there is in the property bought with their money." 2 Bom. L.R. 803 (809)=25 B. 52. J

1.—“*Business which Banks may not transact*”—(Concluded).

(d) So again in *Coltman v. Coltman*, L.R. 19 Ch. D. 69, Sir George Jessel said: “I am not satisfied that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under those circumstances would be to say that it was incompetent for a trustee who had improperly appropriated the money of the society and lent it in his own name to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by the reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand.” (*Ibid.*) K

(e) At p. 70 of the same report *Brett, L.J.* says: “The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person who lent him the money, and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection to which it is not for him to take. The contract is, if you will lend me so much money I will pay you that money back on demand. The Consideration is the handing over the money. That is not illegal. The promise to pay back the money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose, in order to an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take.” 2 Bom. L.R. 803 (809, 810)=25 B. 52. L

2.—“*Of any immoveable property.*”

Charge on immoveable property.

—for an *existing* loan may be taken. 25 B. 52=2 Bom. L.R. 803.

L-1

38. Until the expiration of at least fourteen days after notice

Sums payable by
or to Government to
be payable at Banks.

has been given by notification of the Governor-General in Council published, in the case of the Bank of Bengal, in the Gazette of India and the Calcutta Gazette, and, in the cases of the Bank of Madras and the Bank of Bombay, in the local official Gazette, that the Bank will no longer act as Banker for, or pay, receive, collect or remit money, bullion and securities on behalf of the Government, all sums payable by or to the Secretary of State for India in Council, or by or to the Governor-General in Council, or the Government of Bengal or the Governor of Fort St. George in Council or

the Governor of Bombay in Council, on behalf of the Secretary of State for India in Council, at the General Treasury of Fort William in Bengal, or at the General Treasury at Madras, or at the General Treasury at Bombay, shall be payable—

in the case of the Secretary of State for India in Council, or the Governor-General in Council—at the office of the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be,

in the case of the Government of Bengal—at the office of the Bank of Bengal ;

in the case of the Governor of Fort St. George in Council—at the office of the Bank of Madras ; and

in the case of the Governor of Bombay in Council—at the office of the Bank of Bombay.

39. Whenever presentment of any promissory note, bond or other security for payment or any other purpose at any of the said General Treasuries would heretofore have been necessary or sufficient, presentment for such purpose shall be necessary or sufficient (as the case may be) until the expiration of fourteen days after the giving of the notice mentioned in section 38—

Presentment of
promissory notes at
Banks.

in the case of the General Treasury of Fort William—at the office of the Bank of Bengal ;

in the case of the General Treasury at Madras—at the office of the Bank of Madras ; and

in the case of the General Treasury at Bombay—at the office of the Bank of Bombay.

40. The office of the Bank of Bengal shall be at Calcutta, that of the Bank of Madras, shall be at Madras, and that of the Bank of Bombay shall be in the Island of Bombay ;

Place of business.

and the business of the Bank shall be carried on at its office, and at such other place or places in India as the Board may deem advisable, under the provisions of section 42.

41. For the purpose of providing offices and places in and at which to carry on and manage the business of the Bank, and proper residences for its agents, the directors may—

Acquisition of busi-
ness-premises.

- (a) acquire any interest in immoveable property, and
- (b) sell, buy in, resell, exchange, let, furnish, repair, insure against fire and otherwise deal with all or any part of the same as they may consider most conducive to the interests of the Bank.

42. It shall be lawful for the directors to maintain, as branches or agencies of the Bank, any branches or agencies of the present Bank, which may be in existence on the first day of May, 1876,

and, from time to time, to establish branches or agencies at such places within the Presidency in which the Bank is situate as they deem advantageous to the interest of the Bank,

and, which the previous consent of the Governor-General in Council, and subject to such restrictions as to the business to be transacted as he thinks fit in each case to impose (such consent and restrictions being notified in the Gazette of India), to establish branches or agencies at such places outside the Presidency in which the Bank is situate, as the directors deem advantageous for the interests of the Bank :

Provided that no agency of the Bank now or hereafter established in Bombay, Calcutta or Madras shall advance, or lend money, or open cash-credits on securities, or receive deposits and keep cash-accounts, or discount bills of exchange drawn and payable in the Presidency in which it is so established,

or shall act as agent on commission, or transact any business except as agent of its principal Bank, or any of its branches or other agencies.

The directors may discontinue any branch or agency maintained or established under this section.

42-A. (1) With the sanction of the Governor-General in Council, the directors may at any time enter into negotiations for and purchase and taken over the business, including the capital, assets and liabilities, of any banking company carrying on business in India of which the capital is divided into shares, and may pay the consideration for such purchase either in cash or by the allotment of shares in the capital stock of the Bank, or partly in one and partly in the other of these ways, and may, for the purpose of any such allotment of shares,

Establishment of branches and agencies.

Proviso.

Power of Bank to take over business of certain other Banks and for that purpose to increase its capital.

increase the capital stock of the Bank by the issue of such number of shares as may be determined on by them :

Provided that the directors shall not make any increase of the capital stock of the Bank under this section unless the proprietors and shareholders have passed a special resolution in accordance with the provisions of section 13 sanctioning such increase.

(2) The persons to whom such new shares are allotted shall be proprietors of the Bank, and be in all respects in the same position as if they had respectively subscribed and paid for the shares so allotted to them :

Provided always that the business so purchased shall after the purchase be carried on by the Bank subject to the several restrictions contained in this Act.

Explanation.—For the purposes of this section “banking company” means any company formed for the purpose of carrying on the business of banking and registered under the Indian Companies Act, 1882, or the law relating to Companies for the time being in force in British India.

VI of 1882.

(Note).

Legislative change.

This section was inserted by the Presidency Banks (Amendment) Act, 1907
(I of 1907), S. 5. M

CHAPTER IX.

ACCOUNTS AND DIVIDENDS.

43. The directors shall cause the books¹ of the Bank to be
Books to be bal- balanced on every thirty-first day of December
anced twice a year. and every thirtieth day of June.

A statement of the balance at every such period, signed by a majority of the directors, shall be forthwith sent to a Secretary to the Government of India, and in the cases of the Bank of Madras and the Bank of Bombay, also to a Secretary to the Local Government.

The Governor-General in Council in the case of each of the said Banks, and the Local Government in the case of the Bank of Madras and the Bank of Bombay, shall (so long as any such arrangement with the Government as aforesaid, which has already been, or shall hereafter be, entered into, remains in force) at all times be entitled to require of the directors any information touching the affairs of the Bank and the production of any document of the Bank,

and, in the case of each of the said Banks the Governor-General in Council may require the publication of such statements of its assets and liabilities at such intervals and in such form and manner as the Governor-General in Council thinks fit.

Every requisition under this section shall be signified in writing under the hand of a Secretary to the Government of India or to the Local Government (as the case may be), and the Directors shall comply with every such requisition.

(Notes).

I.—“Books.”

Share-holder entitled to inspection of books.

The plaintiff, a share-holder of the Bank of Bombay, claimed to be allowed to inspect the register of share-holders of the Bank, with the object that “having observed irregularities in the management of the said Bank, in the election of its Directors, in the advancing of large sums of money to its Directors, and in other matters relating to the said Bank,” he desired inspection of “the register of the present share-holders so as to enable him to communicate with the other share-holders, and, if possible, obtain their assent to certain proposed resolutions for the better management of the affairs of the said Bank and for the removal of some of the existing Directors which he intended to bring before a general meeting of the share-holders.”

Held, allowing the plaintiff's claim, that it was but reasonable that a share-holder of a concern like the defendant Bank should desire from time to time to consult other share-holders and discuss with them the affairs of the Bank for the purpose of taking concerted action, where and when necessary, apart from any question of any irregularity existing in the management of the Bank, and that for that purpose inspection of the register of share-holders was necessary. 9 Bom. L.R. 165=31 B. 319. N

Every member of a Corporation has the right under common law to inspect its books and records. 9 Bom. L.R. 177. O

That the right exists is clear from *Grey v. Hopkins*, (1796) 7 Mod. Rep. 129, *Rea v. The Fraternity of Hostmen*, (1795) 2 Stra. 1221, and *The King v. Marchant Tailors' Co.*, (1831) 2 B. & Ad. 115. (*Ibid*). P

And such right does not cease merely because a Corporation is created by a statute which does not confer the right, unless the statute expressly excludes it: *Heslop v. The Bank of England*, (1833), 6 Sim. 192. (*Ibid*). Q

In *Rea v. The Fraternity of Hostmen*, *supra*, a member of the defendant Corporation claimed the right to inspect one of its books for the purposes of a dispute which he had with third parties. The Corporation resisted the claim upon the ground that it was no party to the dispute. But the Court held that that did not matter; “every member of the Corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others.” The right, however, was held to be qualified by the rule that the inspection should be “for a particular purpose” and that it should be confined to the book required for that purpose. 9 Bom. L.R. 177, 178.R

I.—“Books”—(Continued).

This case of *Reaz v. The Fraternity of Hostmen* must be taken to have decided that a member of a Corporation has as such the right to inspect any of its books provided he has a definite object or specified purpose in which he is interested and provided also that an inspection of the book which he requires is necessary for that purpose. It is only an accident that in that case the member who claimed the inspection desired it for the purposes of a dispute actually pending between him and third parties. But the *ratio* of the decision, is not limited by that consideration but covers a wider ground. The *ratio* is that a member of a Corporation as such is entitled to the inspection of any of its documents, if he satisfies the Court that he is seeking inspection not from mere idle curiosity or for some speculative purpose but that he has some reasonable and definite object, in which he is interested, and for which the inspection is required whether that definite object concerns or not any subject then actually in controversy or discussion. This is the principle that can be gathered from *Reaz v. The Fraternity of Hostmen*, 9 Bom. L.R. 173. S

The same principle follows, from *Reaz v. The Merchant Tailors' Co.*, (1831), 2 B & Ad. 115. 9 Bom. L.R. 178. T

As the decision in that case forms the basis of Scott, J.'s judgment, now under appeal before the Court the facts of it and the reasons given by each of the learned Judges, who decided it, require close examination for the purpose of ascertaining the rule of law to be deduced from it. Inspection was there claimed of *all* the documents, books and records of the Corporation. The corporation admitted that every member of it had the right to inspect its “register of apprentices and free men” but denied his right to other books, documents, and records. The members, who claimed the right to inspect all the books, documents, and records of the Corporation, specified no purpose other than the vague one that they wished to find out if its affairs were properly conducted. Under those circumstances the Court held that the claim was novel and that, allowed, it would to “great inconvenience and much expensive litigation.” But Lord Tenterden, C.J. also observed, “in all the cases, where a *mandamus* had been granted, the application had been limited by some legitimate and particular object, in which the party had an interest.” He referred to the cases, and no doubt in each of them there was some dispute pending: in some the inspection was for the purposes of suits instituted in others there was some existing controversy for which inspection was required. But Lord Tenterden relied upon them to illustrate his view that there must be “a particular occasion with reference to which the inspection should be granted.” To the same effect is the judgment of Littledale, J. According to him, a member of a Corporation has “no right on speculative grounds to call for an examination of the books and muniments;” but the right comes into force “if a proper occasion is made out in a matter affecting the members of the Corporation.” Taunton, J. held that “there should be some particular matter in dispute between members, or between the Corporation and individuals in it; there must be some controversy, some specific purpose in respect of which

I.—“Books”—(Continued).

the examination becomes necessary,” and that “any particular grievance should be stated.” Patterson, J., is even more clear. After observing that, in his opinion, the rule must be discharged because of “the generality of its terms,” he goes on to say:—“I am far from saying that there may not be particular instances in which a corporator may apply for a *mandamus* to inspect documents or some of them, of the kind here mentioned if he can show a specific ground of application and that the granting of it is necessary to prevent his suffering injury, or to be able him to perform his duties. But he must state a definite object.” Now, a purpose or object may be sufficiently specific, definite and reasonable, and cover the interest of the person applying, and yet there may be no element in it of an existing controversy, dispute, or discussion. There is nothing in any of the *dicta* in the judgments in *Rex v. The Merchant Tailors’ Co.*, which would exclude such an object. On the other hand, the observations of the learned Judges that “a proper occasion must be made out,” “some specific purpose proved” or “some definite object stated in which the party claiming inspection is interested,” are wide enough to embrace purposes or objects besides those which relate to a pending dispute or discussion. 9 Bom. L.R. 178, 179. U

The English authorities, which above dealt with, as to the common law right of a number of a Corporation to inspect its books and records have been considered and followed by the Courts in the United States of America. 9 Bom. L.R. 179. Y

In *In re Steinway*, 45 L.R.A. 461-475; 159 N.Y. 250, Vaun, J., delivering the judgment of the New York Court of Appeals, says:—“The right of a corporator, who has an interest, in common with other corporators, to inspect the books and papers of the Corporation, for a proper purpose and under reasonable circumstances, was recognized by the Courts of King’s Bench and Chancery from an early day and enforced by motion or *mandamus*, but always with caution, so as to prevent abuse,” and he cited in support of that proposition *Rex v. Fraternity of Hostmen*, (1796), 2 Stra, 1221, *Gery v. Hopkins*, 1796, 7 Mod. Rep. 129, and *The King v. Merchant Tailors Co.*, (1831), 2 B. & Ad. 155, among other English cases, 9 Bom. L.R. 179, 180. W

And he concludes as follows: “We think that, according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his Corporation at a proper time and place and for a proper purpose, and that if this right is refused by the officers in charge, a writ of *mandamus* may issue, in the sound discretion of the Court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the Court should proceed cautiously and discretely, according to the facts of the particular cause.” 9 Bom. L.R. 180. X

In *State of Washington v. Pacific Brewing and Malting Co.*, 47 L.R.A. 208, decided by the Washington Supreme Court, Fullerton, J. delivering the judgment of the Court, said: “The stock holders of a Corporation, have, at common law, for a proper purpose and at seasonable times, a right to inspect any or all books and records of the Corporation. While this right is universally recognized, the Courts disagree

I.—“Books”—(Concluded).

as to what is a proper purpose, or, rather, as to what facts are sufficient to warrant the Court in directing by *mandamus* permission to inspect, where the stockholder has been refused such by the officers of the corporation.” 9 Bom. L.R. 180. Y

And then, citing the English case of *The King v. Merchant Tailors' Co.* (1831), 2 B. & Ad. 115, he proceeds to observe: “The principle announced in this case has been followed by some of the Courts of this country, in so far at least, as to hold that the mere benefit of knowledge to be derived from the books as to the proper conduct of the business is not a sufficient cause for the issuance of the writ to compel the corporate officers to grant an inspection; but that something must be shown, as that a controversy is depending, or that some question or interest is involved with reference to which the contents of the books may be applicable—The injustice of this rule, when applied in all its strictness has been so keenly felt that in England, and in many of the United States, the right of inspection of corporate books is now guaranteed to the stockholders by statute and such statutes seem to be generally held not to be innovations on, but declaratory of, the common law. The tendency of the modern decisions, also, is towards holding that a stockholder, as such, has a right to inspect the books and other documents of the corporation, where its sole object is to inform himself as to the manner in which the business of the Corporation is being conducted.” 9 Bom. L.R. 180, 181. Z

Accordingly the Court there held that “a stockholder of a Corporation has the right, at reasonable times, to inspect and examine the books and records of such Corporation, so long as his purpose is to inform himself as to the manner and fidelity with which the corporate affairs are being conducted and his examination is made in the interests of the Corporation. Nor will it be presumed, when such request is made, that the purpose of the inspection is other than in the interest of the Corporation, and when it is charged to be otherwise, the burden should be on the officers refusing such request or the Corporation to establish it.” 9 Bom. L.R. 181. A

Whether, if the question should arise in this Court, it should follow the “modern tendency of the decisions” pointed out by Fullerton, J. and hold that a stockholder of a Corporation has the common law right of inspection to the extent decided in the Courts of the United States of America? 9 Bom. L.R. 181. B

44. An account of the profits of the Bank during the previous half-year shall be taken on or immediately after every thirty-first day of December and every thirtieth day of June,

Dividends to be determined half-yearly.

and a dividend¹ shall be made as soon thereafter as conveniently may be,

and the amount of such dividend shall be determined by the directors, subject to the provisions of section 45.

No unpaid dividend shall bear interest as against the Bank.

(Notes).

1.—“Dividend.”

Dividend, meaning of.

(a) Etymologically a dividend is the “dividendum,” the total divisible sum. But in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. *Lamplough v. Kent Waterworks*, (1903), 1 Ch. 575 (580).

(b) As to the meaning of the word “dividened,” see *Henry v. Great Northern Railway Co.*, 1 De. G. and J. 606, 636, 642, 647. C

45. The directors, before declaring any dividend, may set aside out of the profits of the Bank such a sum as they think proper as a reserve-fund, and invest the same upon any of the securities specified in section 36, paragraph (a), clauses (1), (2), (3) and (4).

46. The directors may from time to time apply such portion as they think fit of the reserve-fund to meet contingencies, or for equalising dividends, or for any other purposes of the Bank, which they from time to time deem expedient.

CHAPTER X.

AUDIT.

Election of auditors.

47. Two auditors shall be elected and their remuneration fixed at the annual general meeting.

Who may be auditors.

The auditors may be proprietors or shareholders; but no director or other officer of the Bank is eligible during his continuance in office.

Auditors re-eligible.

Any auditor shall be re-eligible on his quitting office.

The persons

who shall be auditors on the first day of May, 1876, and all auditors elected under this section, shall severally be and continue to act as auditors until the first general meeting after their respective elections:

Auditors' tenure of office.

Provided that, if any casual vacancy occurs in the office of any auditor, the directors shall forthwith call a special meeting for the purpose of supplying the same.

Supply of casual vacancy in office.

48. Every auditor shall be supplied with a copy of the half-yearly balance-sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

Rights and duties of auditors.

Every auditor shall have a list delivered to him of all books kept by the Bank, and shall at all reasonable times have access to the books, accounts and other documents of the Bank, and may (at the expense of the Bank) employ accountants or other persons to assist him in investigating such accounts, and may, in relation to such accounts, examine the directors or any other officer of the Bank.

The auditors shall make a report to the proprietors and shareholders upon the annual balance-sheet and accounts; and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet containing the particulars required by the bye-laws made under this Act, and properly drawn up so as to exhibit a true and correct view of the state of the Bank's affairs, and in case they have called for any explanation or information from the directors, whether it has been given by the directors and whether it has been satisfactory.

Such report shall be read together with the report of the directors at the annual general meeting.

CHAPTER XI.

MEETINGS.

49. On the first Monday of the month of August in every year, or as soon after such day as is convenient, Annual general meeting. general meeting shall be held, at which the directors shall submit to the proprietors and shareholders a statement of the affairs of the Bank made up to the preceding thirtieth day of June.

A notice convening such meeting, signed by the secretary, shall be published in the local official Gazette, and in the case of the Bank of Bengal also in the Gazette of India, at least fifteen days before the meeting is held.

50. Any ten or more proprietors or shareholders holding stock or shares, or both, to the aggregate amount of fifty thousand rupees, or any three directors, may convene a special meeting upon giving fifteen days' previous notice of such meeting, and of the purpose for which the same is convened, as well to the directors as also by public advertisement in the local official Gazette, and in two of the English daily newspapers and one of the Vernacular newspapers:

Provided that three months' previous notice shall be thus given of any special meeting held for the purpose of increasing or reducing the capital of the Bank, and shall also be served on every proprietor and shareholder.

51. No business shall be transacted at any meeting, whether
 Quorum. general or special, unless a quorum of twenty
 proprietors or shareholders, or both, in person or
 by proxy, is present at the commencement of such business.

If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened by proprietors or shareholders not being directors, shall be dissolved: in any other case it shall stand adjourned to the same day in the following week at the same time and place, and if at such adjourned meeting a quorum is not present, it shall be adjourned *sine die*.

52. At meetings, whether general or special, every election and
 Decision by major- other matter submitted to the meeting shall be
 ity of votes. decided by a majority of votes, except as in section
 13 and in section 27, clause 4, is specially
 provided,

and no person shall be allowed to vote at any such meeting in
 Persons not respect of any stock or share acquired by trans-
 allowed to vote. fer, unless such transfer shall have been complet-
 ed and registered at least three months before the
 time of such meeting.

And no shareholder shall be entitled to vote at any meeting in
 Shareholders in respect of any shares held by him alone or jointly,
 arrear as to calls. whilst any call due from him alone or jointly
 remains unpaid.

53. A declaration by the chairman of any meeting, except a
 special meeting held under section 13, that a reso-
 Power to declare lution has been carried thereat upon a show of
 resolution carried by show of hands. hands ¹, shall be conclusive, and an entry to that
 effect in the book of proceedings of the Bank shall
 be sufficient evidence of that fact, without proof of the number or
 proportion of the votes recorded in favour of or against such reso-
 lution, unless, immediately on such declaration, a poll ² be demanded
 in writing by five proprietors or shareholders present and entitled
 to vote at such meeting.

(Notes).

1.—“Show of hands.”

Poll, no demand of—Voting by numerical majority.

By English common law, votes at all meetings are taken by show of hands, and it is only when a poll is taken that regard is to be had to voting power according to number of shares. Unless a poll is demanded, the voting will go by numerical majority. *Horbury Bridge Co.*, 11 Ch.D. 151 (1877). D

2.—“Poll.”

(1) Poll when to be demanded.

The demand for a poll must be “before or on the declaration of the result of the show of hands.” It seems that a demand for a poll after the meeting has proceeded to other business would be too late. Any attempt to prevent a poll by passing rapidly to other business would fail. *Gore-Browne and Jordan on Joint-Stock Companies*, 30th Ed., p. 524. E

(2) Poll—Demand—Chairman's declaration of the result—Entry in book of proceedings—Effect.

If the section specifies that five or less persons may demand a poll, these provisions will prevail, and a poll may be demanded by the number specified in the section, but not by fewer persons, and, unless the poll is demanded by the proper number of persons, the chairman's declaration of the result of the voting on the special or extraordinary resolution will be conclusive. *Gore-Browne and William Jordan on Joint-Stock Companies*, 30th Ed., p. 261. F

3) Poll—Demand to be made by whom.

(a) It is an attribute at common law of all public meetings that any qualified person may demand a poll. *Reg v. Wimbleton Local Board*, 8 Q.B. Div. 459. G

(b) *Quære*, whether a demand for a poll which has been acceded to can be withdrawn after the close of the meeting. *Re v. Dover*, (1903), 1 K.B. 668. H

54. If a poll be demanded, it shall be taken at such time and place, and (except at the special meeting last

Poll to be taken,
if demanded.

aforesaid) either by open voting or by ballot, as the chairman directs¹, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

(Notes).

1.—“If a poll....chairman directs.”

Poll, demand of—Chairman's duties and rights.

(a) The Chairman has generally, also, to determine how the poll is to be taken. *Gore-Browne and Jordan on Joint-Stock Companies*, 30th Ed., p. 260. I

(b) It has been said that if a poll is demanded, the Chairman cannot direct it to be taken then and there, but that an opportunity ought to be given for the members who are not present to vote at the poll, *Horbury Bridge Co.*, 11 Ch. Div. 109. J

1.—“If a poll....Chairman directs”—(Concluded).

- (c) There is, however, authority to the contrary in *Reg v. D'Oyly*, 12 Ad. & El. 139. K
- (d) *Kay, J.*, held that under a section providing that the poll shall be taken “in such manner as the chairman shall direct,” the poll may be taken then and there. *Chillington Iron Co.*, 29 Ch. D. 159. L
- (e) *Secus*, if the section requires that the poll be taken subsequently, *British Flax Co.*, (1889), W.N. 7. M

55. The proceedings at any meeting, and all resolutions and decisions of such meeting, shall be valid and binding on the Bank, so far as such proceedings, resolutions and decisions are consistent with the provisions of this or any other Act for the time being in force and regulating the Bank.

Proceedings and resolutions at meetings to be binding.

56. At all such meetings, the proprietors or share-holders shall vote according to the following scale :—

The proprietor of capital stock amounting to Rs. 2,000, or the holder of shares of which the total nominal amounts are equal to Rs. 2,000, shall be entitled to.	1 vote.
The proprietor of capital stock amounting to Rs. 10,000, or the holder of shares of which the total nominal amounts are equal to Rs. 10,000, shall be entitled to	2 votes.
The proprietor of capital stock amounting to Rs. 20,000, or the holder of shares of which the total nominal amounts are equal to Rs. 20,000, shall be entitled to	3 votes.
The proprietor of capital stock amounting to Rs. 30,000, or the holder of shares of which the total nominal amounts are equal to Rs. 30,000, shall be entitled to	4 votes.
The proprietor of capital stock amounting to Rs. 40,000, or the holder of shares of which the total nominal amounts are equal to Rs. 40,000, shall be entitled to	5 votes.
The proprietor of capital stock amounting to Rs. 50,000, or the holder of shares of which the total nominal amounts are equal to Rs. 50,000, shall be entitled to	6 votes.

The proprietor of capital stock amounting to Rs. 75,000, or the holder of shares of which the total nominal amounts are equal to Rs. 75,000, shall be entitled to ... 7 votes.

The proprietor of capital stock amounting to Rs. 1,00,000, or the holder of shares of which the total nominal amounts are equal to Rs. 1,00,000, shall be entitled to ... 8 votes.

The proprietor of capital stock amounting to Rs. 1,25,000, or the holder of shares of which the total nominal amounts are equal to Rs. 1,25,000, shall be entitled to ... 9 votes.

The proprietor of capital stock amounting to Rs. 1,50,000, or the holder of shares of which the total nominal amounts are equal to Rs. 1,50,000, shall be entitled to ... 10 votes.

The proprietor of capital stock amounting to Rs. 1,75,000, or the holder of shares of which the total amounts are equal to Rs. 1,75,000, shall be entitled to ... 11 votes.

The proprietor of capital stock amounting to Rs. 2,00,000, or the holder of shares of which the total amounts are equal to Rs. 2,00,000, shall be entitled to ... 12 votes.

Where a person is both a proprietor of stock and a holder of shares, his shares shall, for the purpose of this section, be deemed to be stock.

No proprietor or shareholder shall be entitled to more than twelve votes at any such meeting.

57. Any proprietor or shareholder entitled to vote at any meeting under this Act may give a proxy in writing, either general or special, under his hand or the hand of his attorney duly authorized, to any other proprietor or shareholder.

Proxies of proprietors or shareholders.

Such proxy shall be produced at the time of voting, and shall entitle the person to whom it is given to vote on such matters as shall be authorized by the tenor of such proxy.

But no person shall be permitted to vote in virtue of such proxy unless it has been left for registration at the office of the Bank at least three clear days before the time for holding the meeting at which it is intended to be used :

Provided that a general proxy which has been registered at such office need not be again left for registration previous to any subsequent meeting.

Proxies existing and in force with reference to any of the present Banks, on the first day of May, 1876, shall continue in force and be available at meetings under this Act, anything herein contained notwithstanding.

A general power-of-attorney shall be deemed a proxy within the meaning of this section.

58. If any proprietor or shareholder is a lunatic or idiot, he may vote by his committee or other legal curator, and if any proprietor or shareholder is a minor, he may vote by his guardian, or any one of his guardians, if more than one.

Voting by lunatic
and minor share-
holders.

CHAPTER XII.

NOTICES.

59. Every notice or other document requiring to be served by the Bank upon any proprietor or shareholder may be served either personally, or by leaving it for, or sending it through the post by registered letter addressed to, him at his registered place of abode ;

and every notice sent through the post shall be deemed to have been served at the time at which, in the usual course of post, it would have been delivered.

60. Any proprietor or shareholder who changes his name or place of abode, or being a female marries, and the husband of any such female, respectively, shall not be entitled to recover any dividend or to vote until notice of the change of name or abode or marriage be given to the Bank, in order that the same may be registered.

Every notice to be given on the part of any proprietor or shareholder shall be left at the office of the Bank, or sent through the post by registered letter addressed to the Secretary to the Bank at its principal office.

Service of notices
by Bank.

Notices by share-
holders.

61. Every person who, by operation of law, transfers or otherwise becomes entitled to any stock or shares, shall be bound by any and every notice or other document which, previously to his name and address being entered upon the register of the Bank in respect of such stock or shares, has been given to the person from whom he derives his title thereto.

62. When any notice or document is delivered or sent, in accordance with this Act, at or to the registered place of abode of a proprietor or shareholder, then, and notwithstanding he be then deceased, and whether or not the Bank have notice of his decease, such service of the notice or other document shall, for all purposes of this Act, be deemed service thereof on him, or, if dead, on his heirs, executors, administrators, and every of them.

CHAPTER XIII.

BYE-LAWS.

63. The directors shall as soon as may be make, and may from time to time alter, bye-laws regulating the following matters or any of them :—

- (a) the maximum amount which may be advanced or [lent to or for which bills may be discounted for] any individual or partnership, without the security mentioned in section 36, paragraph (a), Nos. (1) to (5) inclusive, [and the extent of the sums to which accounts may be overdrawn without security under the provisions of the last paragraph of section 37] ;
- (b) the circumstances under which alone advances may be made to directors or officers of the Bank, or the relatives of such directors or officers, or to companies, firms or individuals with which or with whom such directors, officers or relatives are connected as partners, directors, managers, servants, shareholders or otherwise ;
- (c) the particulars to be contained in the half-yearly balance-sheet.

The directors may from time to time make bye-laws regulating the following matters or any of them :—

- (d) the distribution of business amongst the directors ;

- (e) their remuneration ;
- (f) the delegation of any powers of the directors to committees consisting of members of their body ;
- (g) the procedure at the meetings of the board or of any committee of the directors ;
- (h) the books and accounts to be kept at the head and other offices respectively ;
- (i) the reports and statements to be prepared and made by the chief accountant, the heads of departments, and the other officers of the Bank ;
- (j) the management of the branches and agencies ;
- (k) the fees payable for certificates of shares or receipts for stock, or for registration of transfers of shares or stock ;
- (l) the renewal of certificates of shares and receipts for stock, which have been worn out or lost ;
- (m) and, generally, for the conduct of the business of the Bank :

Provided that no bye-law, or alteration or rescission of any bye-law, shall be of any validity, except in so far as the same is consistent with the provisions of this Act, and has been previously approved by the Governor-General in Council, and such approval has been signified in writing under the hand of a Secretary to the Government of India.

Proviso.

(Notes).

Legislative changes.

- (1) The words "lent to or for which bills may be discounted for" were substituted for the words "lent by discount of bills or otherwise to," by the Presidency Banks Act, 1879 (V of 1879), S. 5. N
- (2) The words "and the extent of the sums to which accounts may be overdrawn without security under the provisions of the last paragraph of S. 37" were added by the Presidency Banks (Amendment) Act, 1907 (I of 1907), S. 6. O

CHAPTER XIV.

MISCELLANEOUS.

64. The directors may institute, conduct, defend, compromise, refer to arbitration and abandon legal and other proceedings and claims by or against the Bank or the directors or officers of the Bank, and otherwise concerning its affairs.

Power to institute
and compromise
suits.

65. In any suit brought against any share-holder to recover any debt due for any call or other moneys due from him in his character of share-holder, it shall be sufficient to allege that the defendant is a share-holder of the Bank, and is indebted to the Bank in respect of a call made or other moneys due, whereby a right to sue has accrued to the Bank ;

and, on the hearing of any suits brought by the Bank against any share-holder to recover any debt due for any call, it shall be sufficient to prove that the name of the defendant is on the register¹ of share-holders of the Bank as the holder of the shares in respect of which such debt accrued, and that the call was made, and that notice of such call was duly given to the defendant in pursuance of this or any other Act for the time being in force regulating the Bank ;

and it shall not be necessary to prove the appointment of the directors who made such call, nor that a quorum of directors was present at the Board at which such call was made, nor that the meeting at which it was made was duly convened or constituted.

1.—“On the register.”

Register open to inspection.

The register is open to inspection by share-holder. 31 B. 319=9 Bom. L.R. 165.P

66. Nothing in the 33rd of George the Third, session 2, chapter 52¹, shall be deemed to render it unlawful for any servant of Government, or for any Judge of a High Court, to become a member of any corporation established under this Act.

Modification of 33
Geo. III, sess. 2,
cap. 52.

(Note).

1.—“33rd of George the Third, session 2, Chapter, 52.”

N.B.—The East India Company Act, 1893 (53 Geo. 3, c. 52.)

Q

67. Notwithstanding anything contained in this Act or in section 231 of Act X of 1866¹, whenever the proprietors and share-holders have passed a special resolution that the Bank shall be wound up voluntarily under the Indian Companies Act, 1866, the Bank shall be wound up accordingly, as if it were a Company under that Act :

Power to wind up
Bank under Indian
Companies Act.

Provided that no such special resolution shall be deemed to have been passed unless at least one-third of the proprietors and share-holders holding at least one-half of the paid-up capital of the Bank for the time being, be present in person or by proxy, and a majority poll by open voting in favour of the said resolution and such resolution has been confirmed by a majority of such proprietors and share-holders at a subsequent special meeting held at an interval of not less than one month, nor more than two months, from the date of the meeting at which such resolution was first passed.

(Note).

1.—“Act X of 1866.”

N.B.—See now the Indian Companies Act, 1882 (VI of 1882).

R

68. And whereas the Government of India has agreed to sell, and the directors of the present Bank of Bengal have agreed to purchase, at a premium of twenty-two and a half per centum, the said two thousand two hundred shares of one thousand rupees each held by the Government of India in the same Bank; and it is intended that the directors of the Bank of Bengal as constituted by this Act shall cancel two thousand of such shares, and sell for the benefit of the Bank four hundred shares in the same Bank corresponding with the remaining two hundred shares so agreed to be sold and purchased;

And whereas the Government of India has agreed to sell, and the directors of the present Bank of Madras have agreed to purchase, at a premium of ten per centum, the said five hundred and sixty-two and a half shares held by the Government of India in the same bank: and it is intended that the directors of the Bank of Madras as constituted by this Act shall cancel the same shares;

Purchase and cancellation by directors of 62½ shares in present Bank of Madras.

And whereas, the directors of the present Bank of Madras have purchased and cancelled other sixty-two and a half shares in such Bank;

And whereas the said respective directors of the present Bank of Bengal and Bank of Madras had no power to enter into the said agreements with the Government of India, and the directors of the Bank of Bengal as constituted by this Act have no power to sell the four hundred shares referred to in this section, and the said directors

of the present Bank of Madras had no power to purchase and cancel the said other sixty-two and a half shares ;

And whereas the directors of the Bank of Bengal as constituted by this Act have no power to cancel the said two thousand shares and the said directors of the Bank of Madras as constituted by this Act have no power to cancel the said five hundred and sixty-two and a half shares ;

And whereas it is expedient to confirm the said agreements with the Government of India, and to indemnify the said respective directors of the present Bank of Bengal and Bank of Madras for entering into the same, and to confirm the said purchase of the said other sixty-two and a half shares by the directors of the present Bank of Madras, and to indemnify the same directors for making the same, and for cancelling the same shares, and to empower the directors of the Bank of Bengal as constituted by this Act to sell the said four hundred shares, and to empower the respective directors of the Bank of Bengal and Bank of Madras as constituted by this Act to cancel the said shares so intended to be cancelled ; It is hereby further enacted as follows :—

(a) The said agreements with the Government of India are hereby confirmed, and the said respective directors of the present Bank of Bengal and Bank of Madras are hereby indemnified for entering into the same ; and no suit or other proceeding shall be maintained against any such director in respect of anything *bona fide* done in pursuance of either of such agreements.

(b) The said purchase of the said other sixty-two and a half shares is hereby confirmed, and the said directors of the present Bank of Madras are hereby indemnified for making the same and for cancelling the same shares ; and no suit or other proceeding shall be maintained against any such director in respect of anything *bona fide* done in effecting such purchase and cancellation.

(c) The directors of the Bank of Bengal as constituted by this Act shall have power to sell, and shall, as soon as conveniently may be, sell, the said four hundred shares, either together or in parcels, and either by public auction or private contract, and shall apply the proceeds in or towards paying the price of the shares of

the Government of India so agreed to be purchased by the directors of the present Bank as aforesaid, or otherwise for the benefit of the Bank of Bengal as constituted by this Act.

(d) The directors of the Bank of Bengal as constituted by this Act shall have power to cancel, and shall, as soon as conveniently may be, cancel the said two thousand shares, and the directors of the Bank of Madras as constituted by this Act shall have power to cancel, and shall, as soon as conveniently may be, cancel the said five hundred and sixty-two and a half shares.

SCHEDULE.

(See section 2).

PART I.—STATUTE.

Number and year.	Abbreviated title.	Extent of repeal.
47 George III, sess. 2, cap. 68.	An Act for the better Government of the Settlements of Fort St. George and Bombay, etc.	Sections 8, 9 and 10.

PART II.—ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Title.
IV of 1862	An Act for regulating the Bank of Bengal.
V of 1862	An Act to provide for the payment at the Banks of Bengal, Madras and Bombay of moneys payable at the General Treasuries of Calcutta, Madras and Bombay.
VI of 1862	An Act to annex a schedule to Act IV of 1862.
XXIX of 1863	An Act to declare the receipts of the Banks of Bengal, Madras and Bombay to be sufficient in lieu of the receipts of the Sub-Treasurers of Fort William, Fort St. George and Bombay, respectively.
XIX of 1870	An Act to enable the Directors of the Bank of Bengal to act by a quorum.

PART III.—ACTS OF THE GOVERNOR OF FORT ST. GEORGE IN COUNCIL.

Number and year.	Title.
VI of 1866	An Act for repealing Madras Act V of 1862, and for regulating the Bank of Madras.
I of 1871	An Act to amend Madras Act VI of 1866, to give validity to certain acts done by the Directors of the Bank of Madras, and to enable outgoing Directors to be re-elected.

PART IV.—ACTS OF THE GOVERNOR OF BOMBAY IN COUNCIL.

Number and year.	Title.
X of 1863	An Act for the Re-incorporation and Re-constitution of the Bank and Bombay.
XV of 1866	An Act to amend Act X of 1863 (Bombay).
I of 1867	An Act to reduce the amount of the capital of the Bank of Bombay and of the shares thereon, and to amend Act X of 1863 and Act XV of 1863 (Bombay).

THE PRESIDENCY BANKS ACT, 1876.

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2.—S in Brevier Roman denotes the section.

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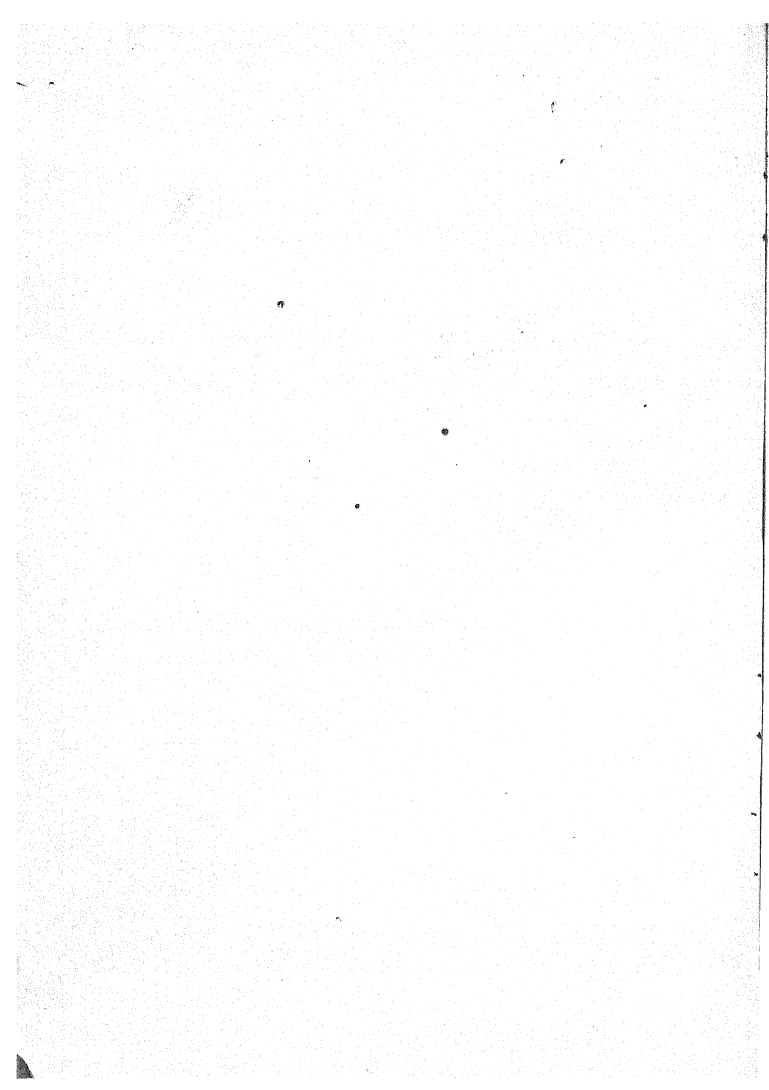
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THE
CO-OPERATIVE CREDIT SOCIETIES
ACT, 1904.

(ACT X OF 1904.)

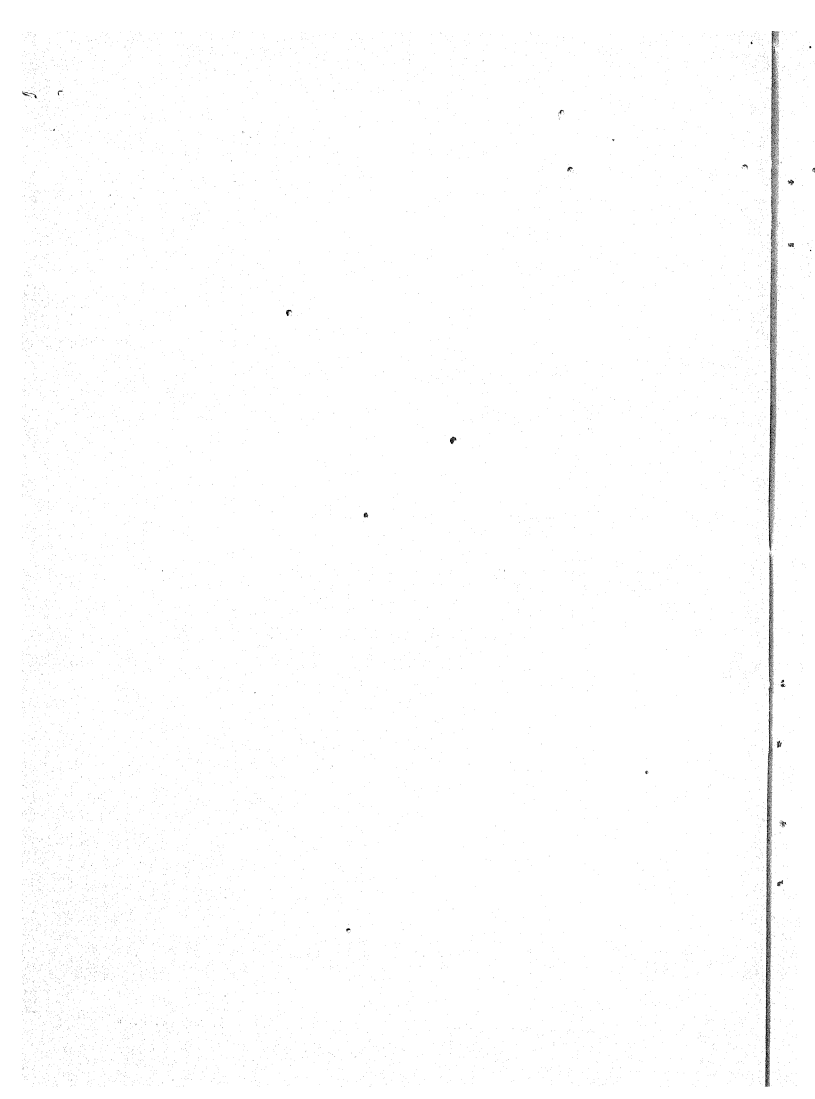
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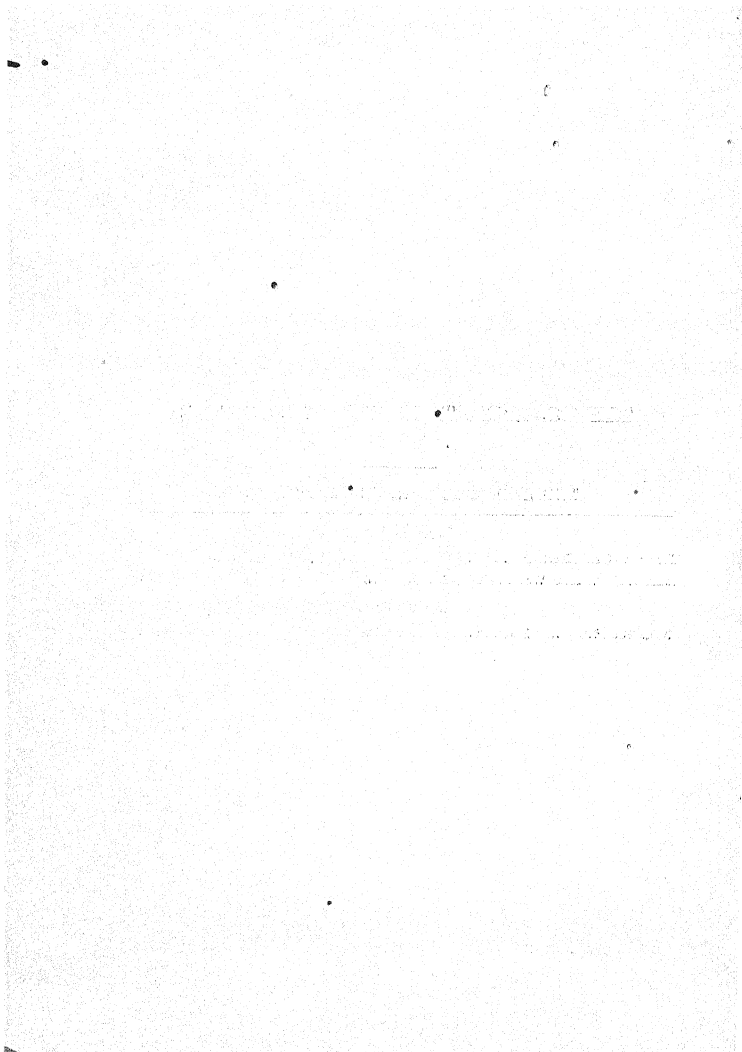
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**THE CO-OPERATIVE CREDIT SOCIETIES
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THE CO-OPERATIVE CREDIT SOCIETIES ACT, 1904.

(ACT X OF 1904.)

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THE CO-OPERATIVE CREDIT SOCIETIES ACT, 1904.

(ACT X OF 1904 ¹.)

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

*(Received the assent of the Governor-General on the
25th March, 1904.)*

*An Act to provide for the constitution and control of Co-operative
Credit Societies.*

WHEREAS it is expedient to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and for that purpose to provide for the constitution and control of co-operative credit societies; It is hereby enacted as follows:—

(Notes).

1.—“Act X of 1904.”

(1) Statement of Objects and Reasons.

For ——— See Gazette of India, 1903, Pt. V, p. 520.

A

(2) Report of the Select Committee.

For ——— See Gazette of India, 1904, Pt. V, p. 65.

B

(3) Proceedings in Council.

For ——— See Gazette of India, 1903, Pt. VI, pp. 170, 191, Gazette of India, 1904, Pt. VI, pp. 16, 22 and 251.

C

(4) Places where Act has been declared to be in force.

The Act has been declared to be in force in the Santhal Parganas by notification under S. 3 of the Santhal Parganas Settlement Regulation, 1872 (III of 1872). See Calcutta Gazette 1905, Pt. I, p. 878.

D

Preliminary.

Short title and
extent.

1. (1) This Act may be called the Co-operative Credit Societies Act, 1904; and

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “by-law” means a rule made by a society in the exercise of any power conferred by this Act, or by any rule made under this Act:

- (b) "committee" means the governing body of a society to whom the management of its affairs is entrusted:
- (c) "member" includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules made under this Act:
- (d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules applying to any society or the by-laws thereof to give directions in regard to the business of the society:
- (e) "Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Credit Societies under this Act: and
- (f) "society" means a co-operative credit society registered under this Act.

Constitution.

Constitution of societies. **3.** (1) A society shall consist of ten or more persons above the age of eighteen years ¹—

- (a) residing in the same town or village or in the same group of villages; or,
- (b) subject to the sanction of the Registrar, consisting of members of the same tribe, class or caste ².

³(2) Societies shall be either rural or urban. In a rural society not less than four-fifths of the members shall be agriculturists. In an urban society not less than four-fifths of the members shall be non-agriculturists.

(3) When any question arises as to whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or whether two or more villages shall be considered to form a group, or whether any person belongs to a tribe, class or caste, the question shall be decided by the Registrar, whose decision shall be final.

(Notes.)

1.—"Society....eighteen years."

Society not restricted to persons of limited means.

Admission to societies under this Act has not been restricted to persons of limited means, but has been thrown open to all persons above the age of 18 years. (See Report of the Select Committee.) E

2.—“ Subject to the sanction....caste.”

Scope of Section.

With the sanction of the Registrar, societies may be formed of persons of the same tribe, class or caste, without regard to propinquity of residence, so as to suit such cases as societies to be formed by Agricultural tribes in the Punjab or Native Christians in the Madras Presidency. [See Report of the Select Committee]. **F**

3.—“ Sub-section 2.”

Power given by this sub-section.

Power has been given by this sub-section to admit to urban and rural societies a proportion of one-fifth of agriculturists and non-agriculturists respectively. **F-1**

Members of society.

4. The members of a society shall be—

- (a) persons joining in the application mentioned in sec. 6, sub-section (1), and registered as a society under sub-section (2) of the same section ;
- (b) persons qualified in accordance with the requirements of section 3 and admitted¹ by the society in accordance with the provisions of this Act and with the by-laws of the society :

² Provided that a person so admitted shall not exercise the rights of a member unless or until he has made such payment to the society in respect of membership or acquired such interest in the society as may be prescribed by the rules made under this Act or the by-laws of the society.

(Notes).

1.—“ Admitted.”

Admission of new members.

- New members need not necessarily be elected by the members for the time being, but may be admitted by the society in any manner provided by the by-laws. **G**

2.—“ Proviso.”

Scope of proviso.

This proviso covers cases in which the condition of admission to membership is the acquisition of an interest in the society as well as the payment of a specific sum. **H**

Registration.

- 5. The Local Government may appoint a person to be Registrar of Co-operative Credit Societies for the Province or any portion of it.
- The Registrar.

6. (1) Any ten or more persons qualified in accordance with the requirements of section 3 and agreeing each to make such payment or acquire such interest as aforesaid, may apply to the Registrar to be registered as a rural or an urban society, as the case may be, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the proposed society as the Registrar may require.

(2) If the Registrar is satisfied that the persons proposing to form a society are qualified in accordance with the requirements of section 3 and have complied with the provisions of this Act and with the rules made thereunder, he may, if he thinks fit, register the society accordingly, and the society shall thereupon become and be a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, moveable or immoveable, to enter into contracts, to institute and defend civil suits ¹ and to do all things necessary for the purposes of its constitution.

(3) Every society shall have an address, registered in accordance with the rules made under this Act, to which all notices and communications may be sent.

(4) The registered name of a society shall distinguish whether the society is rural or urban, and, if the liability of the members is limited, the word "limited" shall be added to such name.

(5) No charge shall be made for registration under this section.

(Note).

1.—"Suits."

Suit by Society—In whose name suit to be brought.

The Chairman of a Co-operative Credit Society has no right to institute a suit against a member of the Society under the Co-operative Credit Societies Act, in his own name. The suit should be one by the Society itself under section 6, cl. (2) of the Act. 10 Ind. Cas, 570. I

A suit in the name of the Chairman must fail. (*Ibid*).

Management.

Liability of members.

7. The liability of each member of a society for the debts of the society shall be as follows:—

(a) in the case of a rural society, such liability shall, save with the special sanction ¹ of the Local Government, be unlimited;

- (b) in the case of an urban society, such liability shall be unlimited or limited as may be provided by the by-laws or by any rules made under this Act.

(Note).

1.—“Special sanction.”

Instance of notification granting such sanction.

For—see Coorg District Gazette, 1907. Pt. I, p. 66.

- 8.¹ (1) No dividend² or payment on account of profits shall be paid to a member of a rural society, but all profits made by such a society shall be carried to a fund (to be called the reserve fund) :

Provided that, when such reserve fund has attained such proportion to the total of the liabilities of the society, and when the interest on loans to members has been reduced to such rates, as may be determined by the by-laws or rules made under this Act, any further profits of the society, not exceeding three-fourths of the total annual profits, may be distributed to members by way of bonus.

- ³ (2) Not less than one-fourth of the profits in each year of an urban society shall be carried to a fund (to be called the reserve fund) before any dividend or payment on account of profits is paid to the members or any of them.

(Notes).

1.—“Sub-section (1).”

Nature of sub-section.

The first portion of this section is limited to rural societies. The rule that in the case of such societies no payment on account of profits shall be made to members, has been relaxed under certain conditions. Precaution against any distribution of profits until the society has accomplished its purpose of reducing interest on loans and finds itself in a thoroughly stable condition, has been made.

2.—“Dividend.”

Dividend, meaning of.

- (a) Etymologically dividend is the “dividendum,” the total divisible sum. But in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. *Lampough v. Kent Waterworks*, (1903), 1 Ch. 575 (580).
- (b) As to the meaning of the word “dividend,” see *Henry v. Great Northern Railway Co.*, 1 De G & J, 606, 636, 642, 647.

3.—“Sub-section 2.”

Application of sub-section.

This sub-section applies to all urban societies, whether unlimited or limited. (See Report of the Select Committee).

9. A society¹ may receive deposits from members without restriction, but it may borrow from persons who are not members only to such extent and under such conditions as may be provided by its by-laws or by rules made under this Act.

Restrictions on borrowing.

(Note).

1.—“ Society.”

Society.

The term “ society ” here refers to both kinds of societies “ rural ” and “ urban.” (See Report of the Select Committee). N

Restrictions on loans.

10. (1) A society shall make no loan to any person other than a member :

Provided that, with the consent of the Registrar, a society may make loans to a rural society.

(2) Save with the permission of the Registrar to be given by general order in the case of each society, a rural society shall not lend money on the security of moveable property.

(3) The Local Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immoveable property or any kind thereof by any society or class of societies.

11. A society may deposit its funds in the Government Savings Bank or with any banker or person acting as a banker approved for this purpose by the Registrar.

Deposit of society's funds.

Shares and Interests of Members.

12. Where the liability of the members of a society is limited by shares, a member shall not hold more than such portion of the capital of the society, subject to a maximum of one-fifth, as may be prescribed by any rules made under this Act :

Limit on capital held by member.

Provided that no member of such a society shall hold more shares than represent a nominal value of one thousand rupees.

13. (1) Where the liability of the members of a society is not limited by shares, each member shall, notwithstanding the amount of his interest in the capital, only have one vote as a member in the affairs of the society.

Votes of members.¹

(2) Where the liability of the members of a society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws of the society.

(Note).

1.—“*Votes of members.*”

This section deals with the question of the voting power of members. In the case of societies not limited by shares, with a view to preventing preponderating influence by individual members, the principle of one man one vote, is adopted. In the case of societies limited by shares, the number of votes that may be given by a member is limited by the bye-law.

14. (1) A member shall not transfer any share held by him or his interest in the capital of the society or any part thereof, unless he has held such share or interest for one year at least.

Restrictions on transfer of share or interest.

(2) The share or interest of a member in the capital of a society shall not be transferred or charged, unless to the society or to a member of the society and subject to any conditions as to maximum holding prescribed by this Act or by the by-laws or by any rules made under this Act.

15. Subject to the provisions of section 20, the share or interest of a member in the capital of a society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee nor a Receiver appointed under¹ Chapter XX of the Code of Civil Procedure shall be entitled **XIV** of 1882. to or have any claim on such share or interest.

Shares or interest not liable to attachment.

(Note).

1.—“*Chapter XX of the Code of Civil Procedure.*”

N.B.—See now the Provincial Insolvency Act, 1907 (III of 1907), S. 56 (2).

16. On the death of a member, the society may pay to or transfer to the credit of the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, such person as may appear to the Committee to be entitled to receive the same as heir or legal representative of the deceased member, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws and all moneys due to him from the society, and the society shall thereupon be absolved from all liability in respect of such share or interest or other moneys as aforesaid.

Transfer of interest on death of member.

17. The liability of a past member for the debts of the society as they existed at the time when he ceased to be a member shall continue for a period of one year from the date of his ceasing to be a member.

Liability of past member.

(Note).

N.B.—The analogy of the Indian Companies Act has been followed here. (See Report of the Select Committee).

18. The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of the society as they existed at the time of his decease.

Liability of the estates of deceased member.

(Note).

N.B.—The analogy of the Indian Companies Act has been followed here. (See Report of the Select Committee).

Priority of Society's claim against a member.

19. Subject to any prior claim of the Government in respect of land-revenue or any money recoverable as land-revenue or of a landlord in respect of rent or any money recoverable as rent, a society shall be entitled in priority to other creditors to enforce its claim—

Prior claim of society as against crops, agricultural produce, cattle, implements and raw material.

- (a) upon the crops or other agricultural produce of a member or past member at any time within a year from the date when seed or manure was advanced or money for the purchase of seed or manure was lent to such member or past member, in respect of the unpaid portion of such advance or loan¹:
- (b) upon any cattle, agricultural or industrial implements or raw material for manufactures, supplied by the society or purchased in whole or in part with money lent by the society, in respect of the outstanding liability on account of such supply or loan.

(Notes).

1.—“Subject to any prior....loan.”

Scope of the section.

If the prior claim of society against a member for seed advanced, or money lent for the purchase of seed, extended only to the crops grown from that seed, awkward questions might arise in realization. So the priority is extended to all crops or agricultural produce and is limited to a period of one year from the date of the advance of seed or loan. Manure has been put in the same category as seed. (See Report of the Select Committee).

20. A society shall have a charge upon the shares or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society, and may set-off any sum credited or payable to a member or past member in or towards payment of any such debt.

Charge and set-off
in respect of shares
or interest of mem-
ber.

Audit, Inspection and Inquiry.

Audit, inspection
and inquiry.

21. (1) The Registrar shall audit the accounts of each society once at least in every year.

(2) No charge shall be made in respect of any audit made under sub-section (1).

(3) The audit under sub-section (1) shall include an examination of overdue debts, if any, and a valuation of the assets and liabilities of the society.

(4) The Registrar, the Collector or any person authorized in this behalf by the Registrar or the Collector, may at any time inspect the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection shall require.

(5) The Registrar may of his own motion, and shall on the request of the Collector, or on the application of a majority of the Committee or not of less than one-third ¹ of the members, hold an inquiry into the constitution, working and financial condition of a society, and all officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar may require.

(6) Where an inquiry is held under sub-section (5), the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members demanding an inquiry and the officers or former officers of the society.

(7) Any sum awarded by way of costs under sub-section (6) may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable resides for the time being, by the distress and sale of any moveable property within the limits of the jurisdiction of such Magistrate belonging to such person.

(Note).

I.—“One-third.”

Inquiry—Application to be made by how many.

One-third has been substituted for one-tenth as the minimum proportion of members on whose application the Registrar is bound to make an inquiry, in order that the Registrar's time may not be wasted in inquiries on frivolous and vexatious applications. (See Report of the Select Committee). 9

22. A copy of any entry in a book of a society regularly kept in the course of business, shall, if certified in such manner as may be prescribed by rules made under this Act, be received, in any suit to recover a debt due to the society, as *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

Mode of proof of entries in societies' books.

(Note).

This section and S. 4, Bankers' Books Evidence Act.

This section has been somewhat expanded so as to bring it more into line with the provisions of section 4 of the Bankers' Books Evidence Act, 1891, which provides for the admission in evidence of certified copies of entries in bankers' books. [See Report of the Select Committee]. R

Dissolution of a Society.

23. (1) If the Registrar, after holding an inquiry under S. 21, sub-section (5), or on receipt of an application made by three-fourths of the members of a society, is of opinion that a society ought to be dissolved, he may cancel or may refuse to cancel the registration of the society.

Dissolution.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order to the Local Government.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period. Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the Local Government.

(4) Where an order made under sub-section (1) cancelling the registration of a society takes effect, the society shall cease to exist as a corporate body.

Cancellation of
registration of
society.

24. (1) Where the registration of a society is cancelled under section 23, the Registrar may appoint a competent person to be liquidator of the society.

(2) A liquidator appointed under sub-section (1) shall have power to institute and defend suits on behalf of the society by his name of office, and shall also have power—

- (a) to sue for and recover any sums of money due to the society at the date of such cancellation ;
- (b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society ;
- (c) to investigate all claims against the society, and, subject to the provisions of this Act, to decide questions of priority arising between claimants ;
- (d) to determine by what persons and in what proportions the costs of the liquidation are to be borne ; and
- (e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary, for winding up the affairs of the society.

¹ (3) Subject to any rules of procedure made under this Act, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure.

XIV of 1882.

(4) The rules may provide for an appeal to the Court of the District Judge from any order made by a liquidator under this section.

(5) Orders made under this section may be enforced as follows :—

- (a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as the decree of such Court ;
- (b) when made by the Court of the District Judge in the matter of any such appeal as aforesaid, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect to any matter connected with the dissolution of a society under this Act.

(Note).

1.—“*Sub-Section (3).*”

Sub-section (3) and S. 14, Land Acquisition Act, 1894.

Sub-section (3), which defines the supplementary powers of the liquidator has been recast so as to assimilate it to section 14 of the Land Acquisition Act, 1894, which confers like powers on the Collector under that Act. (See Report of the Select Committee). S

Exemptions from Taxation.

Power to exempt from income-tax, stamp-duty and registration-fees.

25. (1) The Governor-General in Council, by notification in the Gazette of India may, in the case of any society or class of society, remit—

- (a) the income-tax¹ payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits;
- (b) the stamp-duty² with which, under any law for the time being in force, instruments executed by or on behalf of a society or by an officer or member and relating to the business of such society, or any class of such instruments, are respectively chargeable;
- (c) any fee payable under the law of registration³ for the time being in force.

(2) A notification exempting any society from the fees referred to in sub-section (1), clause (c), may provide for the withdrawal of such exemption.

(Notes).

Scope of the section.

By this section, all the exemption which it contemplates may be granted in the case of any class of societies as well as of individual societies. (See Report of the Select Committee). T

1.—“*Income-tax.*”

Remission of income-tax on dividends, etc., to members of Societies registered under the Act.

No. 6216-S. R., dated the 3rd September, 1904.—In exercise of the powers conferred by section 25, sub-section (1), clause (a) of the Co-operative Credit Societies Act, 1904 (X of 1904), the Governor-General in Council is pleased to remit the income-tax payable in respect of the profits of any Co-operative Credit Society for the time being registered under that Act, or of the dividends or other payments received by the members of any such society on account of profits. (See *Gazette of India*, 1904, Pt. I, p. 739). U

2.—“Stamp-duty.”

Remission of stamp-duty on instruments executed by or on behalf of Co-operative Credit Societies.

No. 6220.—S.R., dated the 30th September, 1904—In exercise of the powers conferred by section 25, sub-section (1), clause (b) of the Co-operative Credit Societies Act, 1904 (X of 1904), the Governor-General in Council is pleased to remit the stamp duty with which under any law for the time being in force instruments executed by or on behalf of any co-operative credit society for the time being registered under that Act or instruments executed by any officer or member of any such society and relating to the business of the society are respectively chargeable. (See *Gazette of India*, 1904, Pt. I, p. 739). Y

3.—“Any fee payable under the law of registration.”

Remission of Registration fees in favour of Co-operative Credit Societies.

See Government of India Notification No. 2025, dated 20th June, 1910, see *Gazette of India*, 1910, Pt. I, p. 495. W

Debts due to Government.

26. (1) All sums due from a society or from an officer or member or past member of a society as such to the Government, including any costs awarded to the Government under section 21, sub-section (6), may be recovered in the same manner as arrears of land-revenue.

(2) Sums due from a society to Government and recoverable under sub-section (1) may be recovered, firstly, from the property of the society; secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability; and, thirdly, in the case of other societies, from the members.

Rules.

27. (1) The Local Government may, for the whole or any part of the Province and for any society or class of societies, make rules¹ to carry out the purposes of this Act.

Rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) prescribe the forms to be used in applying for the registration of a society and the procedure in the matter of such applications;
- (b) prescribe the conditions to be complied with by persons applying for registration and by persons applying for admission or admitted as members, and provide for the

election and admission of members from time to time, and the amount of payment to be made and interests to be acquired before exercising rights of membership ;

- (c) provide for the withdrawal and expulsion of members and for the payments to be made to members who withdraw or are expelled and for the liabilities of past members ;
- (d) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred ;
- (e) subject to the provisions of section 12, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member ;
- (f) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member ;
- (g) prescribe the proportion to the total liabilities to be attained by the reserve fund and the rate to which interest on loans to members is to be reduced, before profits may be distributed to the members of a rural society ;
- (h) regulate the manner in which capital may be raised by means of shares or debentures or otherwise ;
- (i) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings ;
- (j) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers ;
- (k) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altering and abrogating by-laws, and the sanction to be required to such making, alteration or abrogation ;

- (l) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication of a balance-sheet showing the assets and liabilities of a society ;
 - (m) provide for the persons by whom and the form in which copies of entries in books of societies may be certified ;
 - (n) provide for the formation and maintenance of a register of members and, where the liability of the members is limited by shares, of a register of shares ;
 - (o) provide for the rate at which interest may be paid on deposits, for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society ;
 - (p) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision, or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators ;
 - (q) prescribe the conditions to be complied with by a society applying for the financial assistance of Government ; and
 - (r) determine in what cases an appeal shall lie from the orders of the Registrar, and prescribe the procedure to be followed in presenting and disposing of such appeals.
- (3) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.
- (4) All rules made under this section shall be published in the local official Gazette and on such publication shall have effect as if enacted in this Act.

(5) A copy of the rules relating to a society and of the by-laws thereof for the time being in force shall be kept open to inspection at all reasonable times free of charge at the registered address of the society.

(Notes).

I.—“Rules.”

Rules made by Local Governments.

For rules made by :—

- (1) Bengal, *see* Calcutta Gazette, 1905, Pt. I, p. 1415, *ibid.*, 1906, Pt. I, p. 317, 1909, Pt. I, p. 280.
- (2) Bombay, *see* Bombay Government Gazette, 1905, Pt. I, p. 182.
- (3) Burma, *see* Burma Gazette, 1907, Pt. I, p. 90.
- (4) Central Provinces, *see* Central Provinces Gazette, 1908, Pt. I, p. 6.
- (5) Coorg, *see* Coorg District Gazette, 1905, Pt. I, p. 88, *ibid.*, 1907, Pt. I, p. 4.
- (6) Eastern Bengal and Assam, *see* Eastern Bengal and Assam Gazette, 1908, Pt. II, p. 1565.
- (7) Madras, *see* Fort St. George Gazette, 1907, Pt. I, p. 955, *ibid.*, 1908, Pt. I, p. 34.
- (8) North-West Frontier Province, No. 3419, dated the 22nd August, 1906, Gazette of India, 1906, Pt. II, p. 1152, *ibid.*, 1907, Pt. II, p. 107.
- (9) Punjab, under clauses (*k*, *m* & *p*), *see* Punjab Gazette, 1906, Pt. I, p. 584.
- (10) United Provinces, *see* United Provinces Gazette, 1905, Pt. I, p. 775, *ibid.*, 1907, Pt. I, p. 377; U.P.R. and O. X

Miscellaneous.

VI of 1882.

Indian Companies Act, 1882, not to apply.

28. The provisions of the Indian Companies Act, 1882, shall not apply to societies registered under this Act.

29. (1) Notwithstanding anything contained in this Act, the Local Government may, by special order ¹ in each case, and subject to such conditions as it may impose, permit any association of not less than ten persons above the age of eighteen years to be registered as a rural or an urban society under this Act.

(2) A society so registered shall be subject to the provisions of this Act to the same extent as any other society :

Provided that the Local Government may at any time by order exempt ² such society from any of such provisions, or may direct that they shall apply to such society with such modifications as may be specified in the order.

(Notes).

Object of this section.

Its object is to provide for the registration under the proposed law of special societies which may not be of such a nature as to fall within its provisions. It enables the Local Government by special order to permit any association of ten or more persons above the age of eighteen years to be registered as a society under the Act, with such exemptions from, or modifications of, its provisions as the Local Government may think fit to direct in the case of each such society. [See Report of the Select Committee.] Y

*1.—“Special order.”***Instance of such special order.**

For——, see Central Provinces Gazette, 1907, Pt. I, p. 315. Z

*2.—“Local Government....order exempt.”***Instance of such an exemption.**

For——, see Central Provinces Gazette, 1907, Pt. I, p. 315. A

1. The following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

2. The Bureau of the Census has received information from the Bureau of the Census, Washington, D.C., that the following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

3. The Bureau of the Census has received information from the Bureau of the Census, Washington, D.C., that the following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

4. The Bureau of the Census has received information from the Bureau of the Census, Washington, D.C., that the following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

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11. The Bureau of the Census has received information from the Bureau of the Census, Washington, D.C., that the following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

12. The Bureau of the Census has received information from the Bureau of the Census, Washington, D.C., that the following information was received from the Bureau of the Census, Washington, D.C., on 10/10/50:

THE CO-OPERATIVE CREDIT SOCIETIES ACT, 1904.

I N D E X.

Note 1.—The thick figures at the end of each line refer to the pages of this Act and the alphabets in italics preceding the thick figures refer to the cases having corresponding thick letters against them in those pages.

2.—S in Brevier Roman denotes the Section.

A

Act, X of 1904, Statement of Objects and Reasons, **A**, **3**.

Report of the Select Committee, *B*, **3**.

Proceedings, in Council, *C*, **3**.

Places where Act has been declared to be in force, *D*, **3**.

Short title and extent, *S*, **1**, **3**.

Definitions, *S*, **2**, **3**.

Remission of income-tax on dividends, etc., to members of societies registered under the, *U*, **14**.

Special power to Local Government to register any association under, *S*, **29**, **18**.

Admission, of new members, *G*, **5**.

Agricultural produce, Prior claim of society as against, *S*, **19**, **10**.

Association, Special power to Local Government to register any, under Act, *S*, **29**, **13**.

Attachment, Shares or interest not liable to, *S*, **15**, **9**.

Audit, Inspection and inquiry, *S*, **21**, **11**.

B

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C

Cancellation, of registration of society, *S*, **24**, **13**, **14**.

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Cattle, Prior claim of society as against, *S*, **19**, **10**.

Charge, in respect of shares of interest of member, *S*, **20**, **11**.

Constitution, of societies, *S*, **3**, **4**.

Crops, Prior claim of society as against, *S*, **19**, **10**.

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"Member," *S*, **2**, **3**.

"Officer," *S*, **2**, **3**.

"Registrar," *S*, **2**, **3**.

"Society," *S*, **2**, **3**.

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- Meaning of, L, 7.
- Disposal of profits, S. 8, 7.

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- Power to exempt from, S. 25, 14.
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- Loans*, Restrictions on, S. 10, 7.
- Local Government*, Appointment of Registrar, S. 5, 5.
- Rules made by, S. 27, 15—18.
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- Disposal of profits, S. 8, 7.
- Restrictions on borrowing, S. 9, 8.
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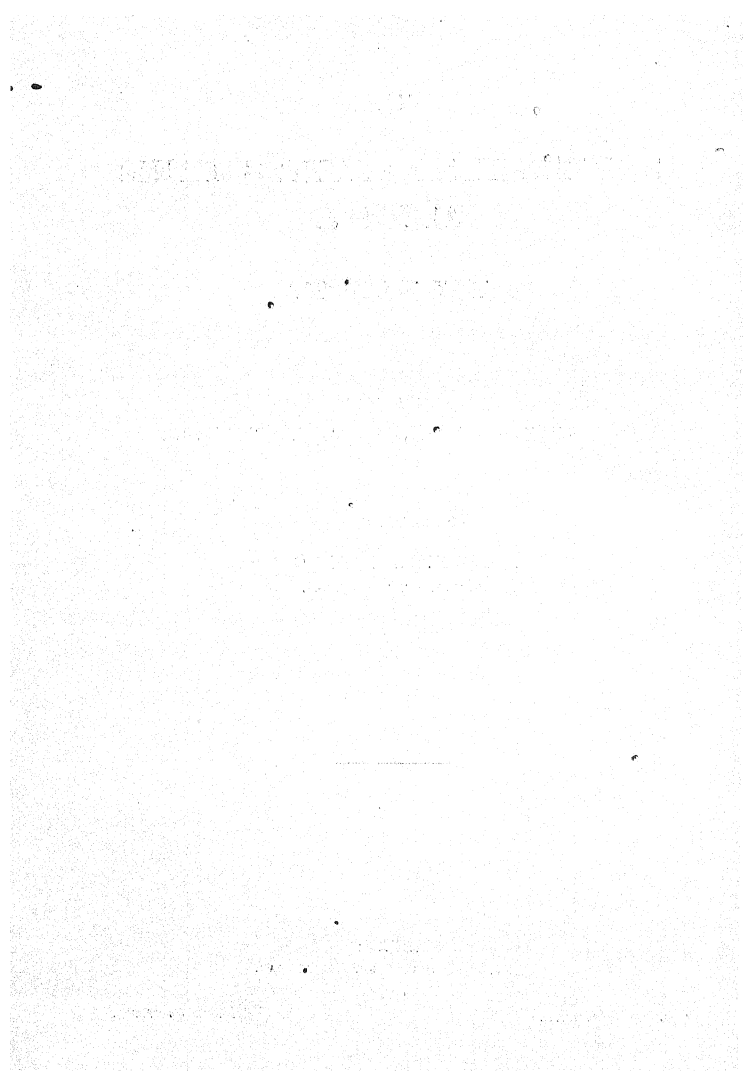
THE
GOVERNMENT SAVINGS BANKS
ACT, 1873.

(ACT V OF 1873.)

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GOVERNMENT SAVINGS BANK ACT, 1873.

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THE GOVERNMENT SAVINGS BANKS ACT, 1873¹.

(ACT V OF 1873.)

(Passed on the 28th January, 1873.)

HISTORICAL MEMOIR.

Year.	No. of Act.	Names of Acts.	How affected.
1855	XXVI	Government Savings Banks Act, 1855 ...	Rep., Act V of 1873.
1873	V	Do. Do.	Rep. in part, Act XII of 1873. Act XVI of 1874. Act XII of 1891.

An Act to amend the Law relating to Government Savings Banks.

WHEREAS it is expedient to amend the law relating to the payment of deposits in Government Savings Banks; It is hereby enacted as follows:—

Preamble.

(Notes.)

1.—“The Government Savings Banks Act. 1873.”

(1) Statement of Objects and Reasons.

For———, see Gazette of India, 1872, Pt. V, p. 575.

A

(2) Proceedings in Council.

For———, see Gazette of India, 1872, Supp. pp. 727, 743, (*Ibid.*), 1873, Supp. pp. 150, 221.

B

(3) Places where Act has been declared to be in force.

Act V of 1873 has been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Santhal Parganas Justice and Laws Regulation, 1899 (III of 1899) and in the Arakan Hill District by the Arakan Hill District Laws Regulation, 1874 (IX of 1874), S. 3.

C

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 to be in force in the following Scheduled Districts, namely:—the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum, see

1.—“Government Savings Banks Act, 1873”—(Concluded).

Gazette of India, 1881, Pt. I, p. 504. The District of Lohardaga (now called the Ranchi District, *see* Calcutta Gazette, 1899, Pt. I, p. 44) included at this time this District of Palamau, separated in 1894.

It has been declared to be in force in Upper Burma generally (except the Shan States), by the Burma Laws Act, 1898 (XIII of 1898), S. 4 (1) and Sch. I. D

(4) Basis of this Act.

The Act is based on “The Trustee Savings Banks Act, 1863,” (26 and 27 Vic. C. 87), S. 30. E

Preliminary.

Short title. 1. This Act may be called “The Government Savings Banks Act, 1873.”

Local extent. It extends to the whole of British India.
[Commencement.] *Repealed by the Repealing Act, 1874*

(XVI of 1874).

2. [Repeal of Act XXVI of 1855.] *Repealed by the Repealing Act, 1873 (XII of 1873).*

Interpretation-clause. 3. In this Act—

“Depositor” means a person by whom, or on whose behalf, money has been heretofore, or shall be hereafter, deposited in a Government Savings Banks, and “deposit” means money so deposited :

“Secretary” includes every person empowered to manage a Government Savings Banks;

and “Minor” means a person who has not completed the age of eighteen years.

(Note).

1.—“Minor.”

Cf.—The Indian Majority Act, 1875 (IX of 1875). F

Deposits belonging to the Estates of deceased Persons.

Payment on death of depositor. 4. If a depositor dies, leaving in a Government Savings Banks a sum of money not exceeding one thousand rupees,

and if probate of his will or letters of administration of his estate, or a certificate granted under Act XXVII of 1860¹ (*for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons*), is not produced to the Secretary of such Bank within three months of the death of the said depositor,

the Secretary of such Bank may pay the said sum of money to any person appearing to him to be entitled to receive it, or to administer the estate of the deceased.

(Note.)

1.—“Act XXVII 1860.”

See now the Succession Certificate Act, 1889 (VII of 1889), S. 2. G

Payment to be a discharge. 5. Such payment shall be a full discharge from all further liability in respect of the money so paid :

But nothing herein contained precludes any executor or administrator, or other representative of the deceased, from recovering from the person receiving the same the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act, or * * * * Act XXVI of 1855, to any person, and remaining in his hands unadministered, in the same manner and to the same extent as if the latter had obtained letters of administration of the estate of the deceased.

Saving of right of executor.

(Notes).

Legislative changes.

The words “the said” were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

Act XXVI of 1855 was repealed by S. 2 of this Act. H

6. The Secretary of any such Bank may take such security as he thinks necessary from any person to whom he pays any money under section 4 for the due administration of the money so paid,

Security for due administration.

and he may assign the said security to any person interested in such administration.

7. For the purpose of ascertaining the right of the person claiming to be entitled as aforesaid, the Secretary of any such Bank may take evidence on oath¹ or affirmation according to the law for the time being relating to oaths and affirmations.

Power to administer oath.

Any person who, upon such oath or affirmation makes any statement² which is false³, and which he either knows or believes to be false⁴, or does not believe to be true⁵, shall be deemed guilty of an offence under section 193 of the Indian Penal Code.

Penalty for false statement.

(Notes).

Scope of section.

False statements by persons claiming to be entitled to deposits belonging to deceased persons, fall within this section. I

1.—“Oath.”

Oaths Act—Idea of oath.

The idea of the oath, namely, that the person swearing renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth, the idea of binding the conscience of the witness, which still prevail, in England, and which in former time led to the swearing of Hindus on the Tulsī and Ganges water, and of Mahomedans on the Koran, finds no place in the Oaths Act, 1873. J

2.—“Any statement.”

“Any statement”, means what?

“Any statement”, i.e., a definite assertion. *In re Maharji*, Cr. L. J. R. 1., 486 = 14 K.L.R. 15. K

3.—“Which is false.”

False statement—Essentials.

It must be shown that the statement said to have been false, could not but be false. It is not sufficient to show that the probabilities are that the statement was false. 10 C.W.N. 1099. L

4.—“Knows or believes to be false.”

False evidence to be intentionally false.

- (a) The false evidence must be intentionally false to the knowledge or belief of the person giving it. Rat. Unrep. Cr. C. 2.
- (b) The matter sworn must be either false in fact or, if true, the accused must not have known it to be so. 1 Hawk C. 69, S. 6.
- (c) A man may be guilty of this offence if he swear that he believes or thinks a fact to be true when it is not. *Schlesinger*, (1847) 10 Q.B. 670. M

5.—“Does not believe to be true.”

False statement, making of—When legally a giving of false evidence.

- (a) The making of a false statement without knowledge as to whether the subject-matter of the statement is false or not, is legally a giving of evidence. 2 W.R. 47. N
- (b) Where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as such perjury as if he knew the fact to be false, and equally indictable. *Mawbey*, (1796) 6 T.R. 619, 637. O

8. Where the amount of the deposit belonging to the estate of a deceased depositor does not exceed one thousand rupees, such amount shall be excluded in computing the fee chargeable, under the Court-fees Act, 1870, on the probate, or letters of administration, or certificate (if any), granted in respect of his property¹:

Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorized to grant the same a certificate of the amount of the deposit in any Government Savings Bank belonging to the estate of the deceased. Such certificate shall be signed by the Secretary of such Bank, and the Court shall receive it as evidence of the said amount.

(Note).

1.—“*Probate....property.*”

Cf. the Savings Bank Act, 1828 (9 Geo. IV, C. 92), S. 40, now repealed by the Savings Banks Act, 1863 (26 & 27 Vict. C. 87). O-1

9. Nothing hereinbefore contained applies to money belonging to the estate of any European officer, non-commissioned officer, or soldier dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter from the said service.

Act not to apply to deposits belonging to estates of European soldiers or deserters.

Deposits belonging to Minors.

10. Any deposit made by, or on behalf of, any minor, may be paid to him personally, if he made the deposit, or to his guardian for his use, if the deposit was made by any person other than the minor, together with the interest accrued thereon.

Payment of deposits to minor or guardian.

The receipt of any minor or guardian, for money paid to him under this section, shall be a sufficient discharge therefor.

11. All payments of deposits heretofore made to minors or their guardians by any Secretary of a Government Savings Bank shall be deemed to have been made in accordance with law.

Legalization of like payments heretofore made.

Deposits belonging to Lunatics 1.

Payment of deposits belonging to lunatics.

12. If any depositor becomes insane or otherwise incapable of managing his affairs, and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be,

such Secretary may, from time to time, make payments out of the deposit to any proper person,

and the receipt of such person, for money paid under this section, shall be a sufficient discharge therefor.

Where a Committee or Manager of the depositor's estate has been duly appointed, nothing in this section authorizes payments to any person other than such Committee or Manager.

(Notes).

1.—“*Lunatics.*”

(1) **Lunatic—Decree of unsoundness of mind.**

As for the degree of unsoundness of mind necessary to have a man declared a lunatic, see 18 M. 572. P

(2) **Lunatic—Unsoundness of mind.**

Unsoundness of mind taken by itself is not sufficient to bring a person within the meaning of the term “lunatic” unless it would incapacitate him from managing his affairs. On the other hand a person who is incapable of managing his affairs is not a lunatic unless that incapacity is produced by unsoundness of mind. *Scherman v. Schorn*, 24 W.R. 124. Q

(3) **Lunatic, person found a, by a competent Court.**

A person found a lunatic by a competent jurisdiction abroad, is considered a lunatic in England. *Ex parte Gillam*, 2 Ves. J. 588, 2 Cox. 193. R

Deposits made by Married Women.

13. Any deposit made by or on behalf of a married woman, or by or on behalf of a woman who afterwards marries, may be paid to her, whether or not the Indian Succession Act, 1865, section 4, applies to her marriage; and her receipt for money paid to her under this section shall be a sufficient discharge therefor.

Rules 1.

14. All certificates under section 8, and all payments under section 10, section 12, or section 13, shall be respectively granted and made by the Secretary of the Bank, subject to such rules consistent with this Act as the Governor-General in Council may, from time to time, prescribe.

Rules regulating certificates under section 8, and payments under section 10, 12, or 13.

(Note).

1.—“*Rules.*”

See Appendix *infra*.

APPENDIX.

RULES FOR THE GUIDANCE OF DEPOSITORS IN POST OFFICE SAVINGS BANKS *

	RULES		RULES
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RULES FOR THE GUIDANCE OF DEPOSITORS IN POST OFFICE SAVINGS BANKS.

The following rules for depositors in Post Office Savings Bank offices and rules. with rules for the purchase, sale and custody of Government Securities, are issued under the authority of the Government of India.

DEFINITIONS.

1. For the purposes of these rules—

Deposit means money paid into a Post Office Savings Bank by, or on behalf of, a depositor.

Depositor means the person by whom, or on whose behalf, money is deposited.

Account means the account of a depositor in a Post Office Savings Bank.

Balance means the balance at credit of an account.

Minor means a person who has not completed the age of eighteen years.

Guardian includes a father, or, if the father be dead, a mother, or, if both parents be dead, and no guardian of the minor has been appointed, by will or deed or under any enactment for the time being in force in British India, any adult relation of the minor with or by whom the minor is residing or being maintained.

Director-General means the Director-General of the Post Office of India.

* See Resolution No. 500—P. O., dated 11th March, 1905.

Postmaster-General means the chief postal authority in any province or place to which the system of Post Office Savings Banks is extended.

Accountant-General means Accountant-General, Post Office and Telegraphs.

OBJECT OF GOVERNMENT IN ESTABLISHING POST OFFICE SAVINGS BANKS.

2. The object of Government in establishing Post Office Savings Banks is to provide a ready means for the deposit of savings, and so to encourage thrift. Savings Banks are not to be used for the purpose of keeping a current account, and the Accountant-General is empowered to close accounts, or, in the case of accounts opened on behalf of minors, to stop the receipt of further deposits, should he have reason to believe that the accounts are being used for a purpose for which the Savings Bank was not intended.

BUSINESS HOURS.

3. Post Office Savings Banks will be open for the transaction of business between the hours of noon and 4 P.M. every day, with the exception of Sundays, Christmas Day, New Year's Day, Good Friday and the King's Birthday. These hours may, under the authority of the Postmaster-General, be altered to suit local circumstances.

POSTAL OFFICIALS BOUND TO SECRECY.

4. The officers of the Post Office engaged in the receipt or payment of deposits are not allowed to disclose the name of any depositor, or the amount deposited or withdrawn by him, except to the Postmaster-General or other officers of the Department engaged in carrying out the provisions of these rules.

PERSONS WHO MAY DEPOSIT MONEY.

5. Any person may deposit money in a Post Office Savings Bank (a) on his own behalf, or (b) on behalf of any minor relative, or (c) on behalf of any minor of whom he is the guardian.

Exception.—A Government official may not open an account on behalf of a minor of whom he is the official guardian.

Explanation.—Minors are allowed to deposit money in their own names, and women, whether married or single, are allowed to deposit money in their own names, but subject, in the case of married women, to the limitation laid down in rules 6 (3).

LIMITATIONS AS TO OPENING ACCOUNTS AND DEPOSITS.

6. (1) Any person may open an account in his own name, but may not have more than one such account open.

(2) In addition to the account which a person may open in his own name, he may open any number of separate accounts on behalf of any minors who are related to him or of whom he is the guardian, provided that he shall not open more than one account on behalf of each such minor.

(3) The fact that an account has been opened on behalf of a minor shall not prevent such minor from opening an account in his own name; nor shall the fact that a married man has an account in his own name prevent his wife from opening a separate account in her own name, provided the money to be deposited by her is her own property or earning.

NOTE.—If, through any cause, an account has been opened in contravention of the provisions of this rule the depositor shall not be entitled to claim interest on the account and the Accountant-General may require him to close it at once.

7. Deposits in trust are not allowed, and cannot be recognised.

8. Money cannot be deposited in the name of two or more persons jointly, provided that nothing in this rule shall prevent the deposit of money in the name of a known firm.

9. The smallest sum of money that can be deposited at any time is four annas; and no sum can be deposited that includes a fraction of an anna.

10. The total amount which may be deposited in any one official year—from the 1st April to the 31st of March inclusive—may not exceed R1,500, of which not more than R500 may remain at call. The excess above R500, together with any further sum at the depositor's credit, which he may wish to invest (being a sum in whole rupees and not less than R10 in all), will be invested for him in Government securities under rule 46.

Example.—A depositor has deposited R500 from April 1st to November 10th, and on November 20th brings R5 as. 3 to the post office to be deposited. The R5 as. 3 will be accepted as a deposit provided that the depositor at the same time signs a form of application requesting that out of the R505 as. 3 any specified sum in whole rupees, not being less than R10 (*e.g.*, R10 or R11) may be invested for him. In this way the depositor may continue to make deposits up to R1500 in all during the year.

NOTE 1.—The annual limit of R500 for deposits remaining at call will be reckoned, irrespective of withdrawals, that is, withdrawals will not be deducted in applying the limit. But amounts deposited for purposes of immediate investment, will be deducted in applying the limit. The proceeds of the sale of Government securities credited to a depositor's account under rule 47 (3) will also be deducted in applying the limit in all cases in which such proceeds are withdrawn before interest becomes due on them under rule 29.

NOTE 2.—When an account is transferred from one Post Office Savings Bank to another, only such portion of it as was deposited in the current official year shall be included in calculating the limit of R500.

* 11. The total amount which a depositor may have at any time, whether at call, or invested, exclusive of interest for the current year, is R5,000 in the case of an adult and R4,000 in the case of an account opened on behalf of a minor by his relative or guardian, provided that, out of these total amounts of R5,000 and R4,000, not more than R2,000 in the case of an adult and R1,000 in the case of a minor may remain at call and that the balance in excess of these sums (*i.e.*, in excess of R2,000 or R1,000 as the case may be) is invested on behalf of the depositor under rule 46. Provided also that only sums in whole rupees and not less than R10 can be invested at any time.

Example.—A depositor has R1,950 at his credit in the Savings Bank and brings R58 as. 5 to be deposited. The R58 as. 5 will be accepted as a deposit provided that the depositor at the same time signs a form of application requesting that out of the R2,008 as. 5 any specified sum in whole rupees not being less than R10 may be invested for him. In this way the depositor may continue to make deposits up to R1,500 each year until his deposit at call and his investments amount together to R5,000.

NOTE.—The maximum balance of R2,000 (or R1,000 if the account was opened on behalf of a minor) which may remain at call may be increased by the addition from year to year of interest calculated on the maximum limit of R2,000, or R1,000, as the case may be, and also by interest on investments, credited under rule 49.

POWERS TO WITHDRAW MONEY AND LIMITATIONS AS TO WITHDRAWALS.

12. A depositor may withdraw money from his account only once a week. By the term "week" is meant the period from Monday to Saturday, both days inclusive. A depositor may, therefore, withdraw money from his account on Saturday and again on the following Monday.

13. A minor may only withdraw money deposited by him in his own name. Money deposited on behalf of a minor may only be withdrawn during his minority by his guardian.

* Was substituted by Notn. No. 4329—4333—181—P., dated 1st June 1906.

14. Women, whether married or single, may withdraw money deposited by them in their own names; and married women may also withdraw money deposited by them as single women, in their own names, their marriage notwithstanding. The fact that a female minor, on whose behalf money has been deposited, is married, or becomes married after the account has been opened on her own behalf, shall not prevent her from withdrawing the money so deposited on attaining majority.

15. A depositor may not withdraw a smaller sum than four annas, and he may not withdraw any sum which includes a fraction of an anna unless it be to close his account, in which case he may withdraw the whole balance at his credit.

HOW TO OPEN AN ACCOUNT.

16. Any person wishing to open an account should apply to the nearest post office that is a Savings Bank. Application need not necessarily be made in person; but the applicant must state his name, his occupation or profession, and his place of residence. If he be a Native, he must also state his father's name and caste.

17. The intending depositor must sign a declaration, in the following form, that he has read and accepted the Post Office Savings Bank rules. If he be unable to write, he must attend personally, and, in the presence of a witness, affix his mark or seal to the declaration, to be attested by the signature of the witness. If he should apply in person, a copy of these rules will be given to him to read, or they will be read and explained to him, should he be unable to read. If he should not apply in person, a copy of these rules with the form of declaration will be sent to him and he must present the declaration duly signed, with the first deposit.

Form of declaration to be signed by depositor on making first deposit.

"I hereby declare that the Post Office Savings Bank Rules have been read { by me }
and that I accept them as binding upon me. { to me }

"I further declare that I have no account opened by me on my own behalf at any Post Office Savings Bank."

18. Women may open accounts in their own names through their agents or, if they are married women, through their husbands or agents. The agent or husband will be required to produce a letter of authority in the prescribed form from the depositor and to sign the declaration that the depositor understands and accepts the rules. No postal official may under this rule be the agent of any woman, except his own wife, in respect of an account held in the post office in which he is employed.

19. When the declaration is presented, duly signed, with the amount of the first deposit or when it has been signed by a depositor attending in person to make a deposit, the amount of the deposit will be entered in a pass-book which will be supplied to the depositor, and the entry will be initialled by the postmaster and stamped with the office stamp. The depositor will be required to sign a receipt for the pass-book.

20. If the account be opened at a sub or branch post office, the pass-book for the depositor will have to be obtained from the head office. A preliminary receipt for the amount of the first deposit will, therefore, be given to the depositor, who will be informed of the date on which he should call to receive the pass-book. When the pass-book is

* NOTE.—The latter sentence is to be scored through in the case of an account opened on behalf of minor, in which case the person opening the account must make the following further declaration.

"I declare that I have no account on behalf of the minor at any Post Office Savings Bank."

"I declare that the minor was born on (date by—Christian era as nearly as can be ascertained)."

handed over to the depositor he will be required to return this preliminary receipt and to sign a receipt for the pass-book. The amount of the original deposit will be entered in the pass-book by the head office, and the depositor will therefore have a guarantee that the sum has been received in that office. He should be careful to see that the entry in the pass-book corresponds with the amount entered in the preliminary receipt before giving up the latter.

PASS-BOOK AND ITS IMPORTANCE.

21. The pass-book will show, in the vernacular of the district or in English, as the depositor may wish, the number of his account, with the name of the office from which the book is issued, his own name, occupation or profession, and address. No deposit can be made and no money can be withdrawn from an account without its production, and the Post Office will not be responsible for any sum not acknowledged in the pass-book. Depositors should carefully examine their books before leaving the office, and ascertain that the entries are correct. They should also be careful to keep their pass-books in their own possession, as the Post Office does not accept responsibility for any loss caused to a depositor, if through his negligence, any person shall obtain possession of the book and fraudulently obtain the payment of any sum belonging to the depositor.

* NOTE.—In the case of an account opened at a sub or branch post office, the pass-book will be sent to the head office as soon as possible after the 15th June, when the pass-book is presented for entry of interest under rule 30. The depositor will obtain a receipt in exchange for his pass-book, and he must give up this receipt when his pass-book is returned to him.

LOSS OF PASS-BOOK.

22. No charge will be made for the pass-book at first supplied to a depositor, or for any book issued to him in continuation of the original book which will be retained by the post office. But if a pass-book be lost or spoiled (except under circumstances over which the depositor has no control), or if any account be re-opened with the permission of the Accountant-General (under rule 35), before the expiration of three months from the date of closure, the depositor will have to pay one rupee for a fresh book.

MODE OF DEPOSITING MONEY AFTER AN ACCOUNT HAS BEEN OPENED.

23. (1) A depositor may deposit money at the post office at which his account stands as often as he wishes, so long as the prescribed yearly and maximum limits are not exceeded. All that he is required to do is to take or send the amount to be deposited with his pass-book, to the post office. The amount of his deposit will be entered in the pass-book, and the balance struck as shown below. The entry will then be initialled by the postmaster and stamped with the date-stamp of the office, and the pass-book will be returned to the depositor or his messenger :—

Date.	Date-stamp of the post office.	Amount of each deposit or withdrawal (to be entered in words).	Amount deposited.	Amount withdrawn.	Balance at credit of the depositor.	Initials of the post master.
1883.			<i>R. a. p.</i>	<i>R. a. p.</i>	<i>R. a. p.</i>	
3rd April	Deposited ten rupees .	10 0	...	10 0 0	A.B.C.
15th „	Deposited twenty-five rupees .	25 0 0	...	35 0 0	A.B.C.
2nd May	Withdrawn three rupees	3 0 0	32 0 0	A.B.C.

* Substituted by Notification No. 5676—5680—191, dated 19th July, 1906.

(2) A depositor whose account stands at a head office may deposit money at any of the sub-offices under that head office which are Savings banks, and a depositor whose account stands at a sub-office may deposit money at the head office of the sub-office or at any of the sub-offices of that head office which are Savings Banks. Similarly, a depositor at a branch office may deposit money at the office to which it is subordinate and if such office is a sub-office, he may also deposit money at the head office of such sub-office. With these exceptions, a depositor may deposit money only at the post office at which his account stands.

NOTE 1.—No deposit may be made to an account which has been ordered to be closed.

NOTE 2.—No deposit may be made to an account opened on behalf of a minor after he has attained the age of 18 years.

24. If the amount be deposited at a sub or branch post office, the depositor will receive, in addition to the receipt in his pass-book, an acknowledgment from the head office, which will generally be the office at the head-quarters station of the district. This acknowledgment will be delivered to him in ordinary course through the Post Office. If it should not reach the depositor in proper time, or if, when it reaches him, it should show any signs of erasure, or should not agree with the entry in the pass-book, the depositor should immediately apply to the postmaster of the head office, the name of which is in the pass-book, and renew his application again and again until he receives a satisfactory reply.

MODE OF WITHDRAWING MONEY.

25. When a depositor wishes to withdraw money he must present his pass-book personally or by agent at the post office at which his account stands, with a printed form of application for withdrawal, which can be obtained at the post office, signed by himself, and showing the balance at his credit and the amount which he wishes to withdraw. If the pass-book and application for withdrawal are presented by an agent, the name and signature of the agent should be entered in the application for withdrawal before it leaves the depositor's custody, and in any case the entries must be made before the application is presented at the post office. If the depositor is unable to write, he must attend personally and affix his mark or seal to the application. Should he be absolutely unable to attend personally, he must have his mark or seal affixed to the application and attested by some respectable witness, and the postmaster will make payment to the person presenting this application with the pass-book, after satisfying himself, by such enquiry as he may think proper, of the inability of the depositor to attend and of the genuine character of the application. The mark or seal of a depositor or messenger who cannot write must, at the time he receives payment of a withdrawal, be attested by the signature of a respectable witness (other than the paying officer) who is personally acquainted with the depositor or messenger (as the case may be) and also known to the postmaster or some member of the post office establishment.

NOTE 1.—If a depositor desires to withdraw the whole of the balance shown to his credit in his pass-book, he will be required to close his account.

NOTE 2.—In the case of withdrawals made from the accounts of female depositors by their authorised agents under rule 18, the agent must sign the following certificate on the application for withdrawal:—'Certified that the depositor is on this day alive and sane.'

* This para was added by Notification No. 5676-5680-191, dated 19th July, 1906.

26. Should any person other than the father, or if the father is dead, the mother, wish to withdraw money from an account opened on behalf of a minor and claim to do so as guardian of such minor, he will be required to fill in, on a form prescribed by the Director-General, answers to the following questions and such other questions as may be considered necessary, and will only be allowed to withdraw money on the order of the Postmaster-General in accordance with rule 41 :—

- (a) What is your relationship to the minor ?
- (b) Is the father or mother of the minor dead, or are both parents dead ? What near relatives of the minor are alive ?
- (c) Have you been appointed guardian of the minor by will or deed or under any enactment in force in British India ? (If the reply to this question is in the affirmative, the applicant should produce the documents on which he relies to support his claim.)
- (d) Are you an adult relative of the minor, and does he reside with you or is he maintained by you ?

NOTE.—In the case of withdrawal made from accounts opened on behalf of male minors, the father or other guardian of the minor must sign the following certificate on the application for withdrawal :—

“Certified that the amount sought to be withdrawn is required for the use of the minor.”

In the case of withdrawals made from accounts opened on behalf of female minors, the father or the husband or other guardian of the minor must sign the following certificate on the application for withdrawal :—

“Certified that the amount sought to be withdrawn is required for the use of the

minor ^{who is not married.*}
^{who is my legally married wife.†}

27. The amount to be withdrawn will be entered in the pass-book and a fresh balance struck, as in the case of a deposit, against the initials of the postmaster and an impression of the date stamp of the office. The amount will then be paid to the depositor or to the person presenting the pass-book and application, and his receipt taken, in all cases free of stamp duty, on the warrant of payment.

28. (1) The payment of a withdrawal at a sub-post office is subject to the condition that funds are available in the office. If funds are not available, they will be obtained as soon as possible. In such a case the depositor will be informed of the date on which he should come to the post office to receive payment, and he will retain his pass-book. The amount will be paid on presentation of the pass-book on the date mentioned or any subsequent date within one week from that date.

(2) Every application for a withdrawal at a branch post office will be sent to the head or sub-office to which the branch office is subordinate, for a warrant of payment. The depositor will be informed of the date on which he should come to the branch office to receive payment and he will retain his pass-book. The amount will be paid on presentation of the pass-book on the date mentioned or any subsequent date within one week from that date.

(3) Payment at sub and branch offices will be made to the depositor or other person presenting the pass-book under the conditions laid down in rule 25, and his receipt will be taken in all cases free of stamp duty, on the warrant of payment. The transaction will be entered in the pass-book against the initials of the sub or branch postmaster and an impression of the date-stamp of the office.

* To be scored through in the case of the husband.

† To be scored through in the case of a person other than the husband.

(*) NOTE.—In the case of an application to withdraw from (a) a minor's account, (b) a security deposit account, (c) any of the conjoint accounts specified in rule 44, payment cannot, in any circumstances, be made until a warrant of payment is received from the head office.

INTEREST.

29. Interest will be allowed, until further orders, at the rate of 3 per cent. per annum on all deposits subject to the condition stated in this rule. This interest will be allowed for each calendar month on the lowest balance at credit of an account between the close of the fourth day and the end of the month: provided that interest shall be allowed only on sums of complete rupees, and that it shall be calculated to the nearest pie: provided also that interest shall not be allowed on any sum in excess of Rs.2,000 (or of Rs.1,000, if the amount was opened on behalf of a minor).

NOTE 1.—When an order has been issued to close an account, interest ceases to accrue from the first day of the month in which the order is issued (see end of rule 33).

(1) NOTE 2.—Interest on the account of a deceased depositor ceases to accrue from the first day of the month in which notice is issued to the person or persons recognised by the Postmaster-General as entitled to receive the balance of the account. No interest will be allowed on money deposited after his death in the account of a deceased depositor.

30. The interest calculated as above for each month will be added each year to the balance of each account. Depositors should present their pass-books as soon as possible after the 15th June, in order that the necessary entries may be made in them. If the pass-book be not presented for this purpose, the entry will be made on the next occasion when a deposit is made or when money is withdrawn.

NOTE 1.—Pass-books of depositors in sub and branch post offices will be sent to the head office for the entry of interest under this rule.

NOTE 2.—No balance will be struck in the pass-book after the 31st March until interest has been added for the past year.

TRANSFER OF ACCOUNTS.

31. A depositor may have his account transferred, free of charge, to any post office that is a Savings Bank, *provided that the account shall have been in existence for three months previous to the transfer.* If he should wish to transfer his account, he must present his pass-book personally, or send it to the post office, and must in either case make a written application for transfer (2). [The pass-book will be returned to the depositor, who should present it as soon as possible at the post office to which his account has been transferred, with a specimen of his signature.]

NOTE 1.—Accounts cannot be transferred from one head post office to another between the 16th and 31st March, both days inclusive.

NOTE 2.—Accounts ordered to be closed cannot be transferred.

(†) NOTE 3.—The pass-book of a depositor in a sub or branch post office will first be sent to the head office to have the orders authorising the transfer entered in it.

CLOSING AN ACCOUNT.

32. When a depositor wishes to close his account he must present his pass-book with a form of application for withdrawal of the amount shown at his credit in the pass-book. The amount of interest due on his account up to the end of the calendar

(*) Substituted by Notn. No. 5676—5680—191, dated 19th July, 1906.

(†) See Notn. No. 5676—5680—191, dated 19-7-1906.

month preceding the date of presentation will be entered in the pass-book, and a final balance struck. The amount will then be paid to the depositor, and his receipt taken on the warrant of payment. The pass-book will be retained in the post office. If the application to close an account be presented at a sub or branch office, the same procedure will be followed as in the case of an ordinary withdrawal, except that the pass-book will be retained, and that the application and pass-book will, when interest is due, be in all cases sent to the head office for the warrant of payment.

NOTE.—The rule (*see* rule 12) which prevents a depositor from withdrawing money from his account more than once a week does not apply to the closing of an account, that is to say, an account may be closed within the week in which a withdrawal has been made.

33. If an order to close an account be issued by the Postmaster-General or the Accountant-General under these rules, notice in writing will be sent to the depositor requiring him to present his pass-book and receive payment of the balance at his credit as soon as convenient. After the date of such notice, no deposit will be accepted on the account, and no interest will be allowed upon the balance after the end of the calendar month preceding such date.

(*) 34. An account opened on behalf of a minor must, if still open, be closed by the person on whose behalf it was opened, on his attaining the age of 18 years. When the late minor is not in India and delay would cause substantial hardship, the Postmaster-General may allow the late guardian to close the account (on behalf of the late minor) on his indemnifying the Post Office against loss from any future claim. If a minor after attaining the age of 18 years still remains a minor by law or order of a court of justice, his guardian must close the account on the minor completing 18 years of age. Interest on an account opened on behalf of a minor ceases to accrue from the first day of the month in which the minor attains the age of 18 years.

RE-OPENING AN ACCOUNT.

35. A depositor who has once closed an account cannot open another account until after the expiration of three months from the date of closure without the permission of the Accountant-General; and a depositor whose account has been closed by order cannot open a fresh account in any case without the permission of the authority which ordered it to be closed.

DEAD ACCOUNTS.

36. Accounts in respect of which no transactions have taken place for the period specified below will be treated as "dead" and no subsequent deposit or withdrawal will be allowed in the case of such accounts without the previous orders of the Accountant-General:—

When the balance of the account	And when no sum has been deposited or withdrawn and no interest added for
does not exceed R 10 . . .	3 complete years.
" " " 100 . . .	6 " "
exceeds " 100 . . .	12 " "

NOTE 1.—By "transaction" in this rule is meant not only a deposit or withdrawal but also the presentation of the pass-book for the entry of interest.

NOTE 2.—A dead account does not lapse to Government, but may be re-opened at any time on the application of the depositor, and the interest that has accumulated will be added to the principal when the account is revived.

(*) See Notn. No. 5676—5680—191, dated 19-7-1906.

PROCEDURE TO BE FOLLOWED IN CASES OF SUCCESSION AND
GUARDIANSHIP.

37. If a depositor should die, leaving in a Post Office Savings Bank a balance, whether in cash or in Government securities, or both, not exceeding one thousand rupees, and if probate of his will, or letters of administration of his estate, or a certificate granted under Act VII of 1889, be not produced to the Postmaster-General within three months of the death of the said depositor, the Postmaster-General may pay the said sum of money to any person appearing to him to be entitled to receive it or to administer the estate of the deceased.

NOTE.—If the deceased depositor was a minor in whose name more accounts than one stand open the balances at credit of all these accounts will be added together for the purpose of applying this rule.

38. Balances, whether in cash or Government securities, or both, in excess of R1,000 may only be paid on production of probate, letters of administration, or a certificate under Act VII of 1889, unless otherwise ordered by the Director-General, who has discretionary power to dispense with such evidence in cases where he is of opinion that to require it would cause hardship, and that to dispense with it would involve no appreciable risk. If the balance in excess of R1,000 be that of a cash deposit account opened on behalf of a deceased minor—the balance of which, excluding interest, cannot under these rules exceed R1,000—the discretionary power may be exercised even if the condition of hardship be not established.

NOTE.—In the case of a deceased minor on whose behalf more accounts than one have been opened, and the total balance (excluding interest for the current year) at credit of these accounts exceeds R1,000 the *first sentence* of this rule will apply.

39. If any depositor becomes insane or otherwise incapable of managing his affairs, and if such insanity or incapacity be proved to the satisfaction of the Postmaster-General, then the Postmaster-General may, from time to time, make payment out of the deposits to any proper person. Where a committee or manager has been duly appointed to administer the depositor's estate, nothing in this rule authorises payments to any person other than such committee or manager.

40. The deposits of non-commissioned officers and soldiers of the British Army who die intestate, desert, or become insane or otherwise incapable of managing their affairs, will be made over, on application to the President of the Committee of Adjustment.

41. When any person other than the father, or, if the father is dead, the mother claims to withdraw money from an account opened on behalf of a minor as being the guardian of such minor, the Postmaster-General may authorise the applicant to withdraw money from the account for the minor's use, in accordance with the following rules:—

- (a) Where the applicant claims to be guardian under the law, on production of proof of the claim to the satisfaction of the Postmaster-General.
- (b) Where the applicant claims as guardian duly appointed by will or deed, on production of the documents supporting the claim.
- (c) Where the amount of the account does not exceed R250 and the applicant does not claim to be guardian under clause (a) or clause (b), upon his giving evidence to the satisfaction of the Postmaster-General that he (the applicant) is the guardian of the minor.
- (d) Where the amount of the account exceeds R250 and the applicant does not claim to be guardian under clause (a) or clause (b), upon the applicant producing a certificate of administration granted under Act VIII of 1890.

- (c) In any case of doubt the applicant (not being the father or mother of the minor) may be required to produce a certificate of administration, under Act VIII of 1890, before payment is made to him.

NOTE.—An authority given by the Postmaster-General under (c) will not hold good for a subsequent withdrawal if the balance of the account then exceeds R250.

PUBLIC ACCOUNTS.

(*) 42. [The following special conditions govern the opening of "Public Accounts" and their transactions :—]

- (a) Accounts may be opened by secretaries, treasurers, or managers of the funds of any dispensary, church or other religious institution, school, orphanage, asylum or library, or of any other funds contributed, for purposes other than the private or personal advantage or amusement of the contributors. Race, racquet, billiard, mess and similar funds, the objects of which are of a private or personal nature, cannot be allowed accounts.

Illustration.—The funds of regimental and public bands, which are maintained for purposes other than private advantage or amusement, are admissible.

Explanation (1)—A library fund is admissible, even though the library is open only to subscribers.

(2)—If an Institution has two or more distinct funds which cannot, under their constitution and in accordance with the conditions imposed by the donors, be amalgamated an account is admissible for each such fund.

(3)—The prohibition of current accounts when applied to a public account extends only to the use of the account for full details of the income and expenditure of the fund and does not prevent the periodical credit of subscriptions or other receipts, or the periodical withdrawal of money for expenditure; e.g., a building fund raised for the erection of a church or charitable institution is admissible.

- (b) Secretaries, treasurers or managers of societies registered under the Co-operative Credit Societies Act, 1904 (X of 1904), or under similar enactments in force in Native States, may be allowed accounts.
- (c) Secretaries and managers of benevolent funds (that is, funds formed by mutual subscription as an insurance against domestic misfortune) may be allowed accounts.
- (d) Officers of Government or of public institutions, such as railway and steamer companies, and the like, who collect subscriptions, voluntary or departmental, from their subordinates for departmental purposes, may be allowed accounts.

Explanation.—For the purpose of this rule, the term "Officers of Government" includes any officer of the Government of a Native State the Posts of which have been amalgamated with the Imperial Post.

- (e) Public accounts of the kind specified above must be designated by names indicating the objects to which the money is devoted, as *A-pore Dispensary Fund, Workmen's Sick Fund, etc.*, and information must be given in writing regarding the object and source of income of the fund.
- (f) Each new public account must be authorised by the Postmaster-General before it is opened. The Postmaster-General is empowered to direct that a public account be closed should its object at any time be such that the account could not, under the rules, be opened as a public account.

(*) See Notn. No. 5676—5680—191, dated 19-7-1906.

- (g) In every case in which the holder of a public account, other than a public account held by an officer of Government in his official capacity, is changed a fresh declaration (*see* rule 17) must be filled up.
 - (h) The limitations laid down in rule 6 are not meant to prevent any person from opening more than one *ex-officio* or public account.
 - (i) The prohibition against deposits in the name of two or more persons jointly (*see* rule 8) does not apply to public accounts.
 - (j) The annual limit of R500 and the maximum limit of R2,000 for deposits (*see* rules 10 and 11), as well as the maximum limit of R2,000 for calculation of interest (*see* rule 29), do not apply to public accounts. But no public account may have at any time more than R10,000 at its credit, exclusive of interest for the current year, and no interest will be credited on any sum in excess of R10,000.
 - (k) The amount of withdrawals within a calendar month from a public account is limited to R1,000, unless the person who holds the account gives notice to the Post office at which the account stands of his intention to make additional withdrawals. The notice must specify the amount to be withdrawn and be given one month in advance by means of an ordinary letter addressed to the Postmaster which should specify the date on which it is intended to make the withdrawal, and if it is intended to withdraw the amount in two or more instalments, specific information must be given in the notice as to the number of instalments and the amount and date of withdrawal of each instalment.
 - (l) In the form of declaration (*see* rule 17), which every intending depositor is required to sign, the words "I further declare that I have no account opened by me on my own behalf at any Post Office Savings Bank" should be scored through in the case of a public account.
43. No account may be allowed for money—
- (a) which is the property of Government, or
 - (b) which has been received for credit of Government, or
 - (c) which has been drawn from the Treasury for expenditure on account of Government, or
 - (d) which is raised by taxation, either local or municipal, or
 - (e) which is collected or received or held in trust by any public officer or Court in accordance with any law, provided that the money is the property of Government.

NOTE 1.—Nothing in this rule prevents the opening of a public account for money which is not the property of Government by the Managers of funds held in trust for the relief of the poor, for the provision of education or medical relief, or for the advancement of any other object of general public utility, irrespective of whether such Managers are public officers or not.

NOTE 2.—Nothing in this rule prevents the opening of an account for a judicial deposit in accordance with a special order passed by a Court of law in a particular case directing the investment of the money in the Post office Saving Bank. Such an account, when admitted, is subject in every respect to the rules and limitations which govern ordinary private accounts.

REGIMENTAL, POINCE, AND OTHER CONJOINT ACCOUNTS.

44. The following special conditions govern the opening of the conjoint accounts specified below and their transactions :—

- (a) The Commanding Officer of a Native Regiment may open a single account with the Post Office Savings Bank on account of the men of his regiment making his own arrangements about the separate accounts of the individuals, and about the distribution to them of the interest credited upon the conjoint account. In other respects the account shall, except when the contrary is stated, be subject to the general rules for other account. The Commanding Officer must, when opening the account, sign a certificate, that, to the best of his belief, the money is the property of the men of the regiment.
- (b) District Superintendents of Police, and officers in command or charge of any Police Force, may open similar accounts on account of the men of the Police Force under their command or charge. •
- (c) Chairmen of District Boards and Municipalities are also allowed to have similar accounts on account of servants of such Boards and Municipalities, in accordance with rules which may be sanctioned from time to time by Local Governments.
- (d) Managers of Provident Funds authorised by Government in connection with Courts of Wards and other institutions administered or controlled by Government are also allowed to open similar accounts on behalf of non-pensionable employees paid from the funds of the Courts of Wards or other institutions in accordance with rules which may, from time to time, be sanctioned by Local Governments or Administrations.
- (e) Secretaries of Cantonment Committees are also allowed to open similar accounts on behalf of non-pensionable employees paid from cantonment funds, in accordance with rules which may, from time to time, be sanctioned by the Government of India.

NOTE.—Nothing in this rule shall be held to prevent any member of any of the above-mentioned classes of persons, for whom a conjoint account has been opened, from opening an account of his own, in his individual capacity.

- (f) The annual limit of Rs500 and the maximum limit of Rs2,000 for deposits (see rules 10 and 11), as well as the maximum limit of Rs2,000 for calculation of interest (see rule 29), do not apply to accounts opened under this rule.
- (g) Except with the special sanction of the Director-General, the amount of withdrawals within a calendar month from an account opened under this rule is limited to Rs1,000, unless the person who holds the account gives notice to the Post office at which the account stands of his intention to make additional withdrawals. The notice must specify the amount to be withdrawn and be given one month in advance, by means of an ordinary letter addressed to the Postmaster which should specify the date on which it is intended to make the withdrawal, and if it is intended to withdraw the amount in two or more instalments, specific information must be given in the notice as to the number of instalments and the amount and date of withdrawal of each instalment.
- (h) In the form of declaration (see rule 17), which every intending depositor is required to sign, the words "I further declare that I have no account opened by me on my own behalf at any Post Office Savings Bank" should be scored through in the case of accounts opened under this rule.

SECURITY DEPOSIT ACCOUNTS.

45. The following special conditions govern the opening of security deposit accounts and their transactions :—

- (a) Government servants, servants of railway companies, of local authorities and of Courts of Wards who are required by their employers to deposit security, contractors who are required by Government or local authorities to deposit security, and persons who are authorised under section 202 of the Sea Customs Act, VIII of 1878, to act as agents for the transaction of business in any Custom house on behalf of the public, and are required under that section to deposit security, may be allowed separate accounts for the security deposit only.

Explanation.—For the purpose of this rule, the term “Government servants” includes any servant of the Government of a Native State the Posts of which have been amalgamated with the Imperial Post.

NOTE.—Local authority means any body corporate, municipal committee, or other persons legally entitled to the control or management of any local or municipal fund or legally entitled to impose any cess, rate, duty or tax upon any persons within any local area.

- (b) A person undertaking more than one work or contract at the same time may be allowed a separate account in respect of each.
- (c) The maximum limit for each separate account is Rs500, and the amount may be deposited in a single sum or by instalments.
- (d) A person may open a security deposit account either in his own behalf or on behalf of another person. More than one account, however, may not be opened as security for the same person in respect of the same work or contract.
- (e) A security deposit account may be opened in the joint names of the persons undertaking the same work or contract.
- (f) The depositor will be required to sign a letter (in a form prescribed by the Director-General) addressed to the Postmaster, undertaking not to make any claim on the Savings Bank for the principal of the sum deposited, except with the express written sanction of the person referred to in the letter to whom the security is pledged; not to object to the payment by the Bank of the whole or part of the principal to such person on his claiming it and not to make any claim for interest from the date on which interest has ceased to accrue owing to the payment of the principal to such person or from the date on which such person has sanctioned the repayment of the deposit.
- (g) The officer to whom the security is pledged as above may, with the consent of the person pledging the security, open an account for such security in his own name, e.g., “Executive Engineer, A—pore, on account of security of A.B.” In this case the deposit will be received from the officer to whom the security is pledged and the pass-book will be issued to him.
- (h) Interest on security deposits will accrue and be paid in the usual manner, subject to the conditions specified in the letter mentioned in clause (f) of this rule. No interest, however, will be allowed on any sum in excess of Rs500 that may be at credit of a security deposit account.
- (i) The prohibition against the transfer of an account until it has been in existence for three months (see rule 31) does not apply to security deposit accounts.

- (j) In the form of declaration (see rule 17), which every intending depositor is required to sign, the words. "I further declare that I have not account opened by me on my own behalf at any Post Office Savings Bank" should be scored through in the case of a security deposit account.

INVESTMENTS.*

PURCHASE OF GOVERNMENT SECURITIES.

46. (1) Any person whether previously a depositor in the Post Office Savings Bank or not may invest through the Post Office in Government securities, in one of the 3½ per cent. loans, specifying in his application either the sum to be invested or the nominal value of the securities to be purchased, provided that the sum to be invested or the nominal value of securities to be purchased shall be in whole rupees, and not less than R10: provided also that the total amount invested in any one official year from the 1st of April to the 31st of March shall not exceed R1,000 and that the total amount invested through the Post Office, after deducting any sum sold through the Post Office, shall not exceed R5,000 in the case of an adult or R4,000 in the case of a minor.

(2) If the nominal value of securities purchased is less than R100, an Investment Certificate will be issued. If the nominal value of the securities is R100, the investor may have either an Investment Certificate or a whole piece of Government paper for the amount, and if the nominal value of the securities is above R100, he may have either (i) an Investment Certificate for the entire amount, or (ii) whole pieces of Government paper of R100 or any multiple of R100, and an Investment Certificate for the remainder, provided that the remainder is not less than R10.

NOTE.—In the case of all applications for the purchase of Government securities, either the whole or a portion, of the balance standing at the credit of the depositor's Savings Bank account may be made available, or a special deposit made for the purpose of providing the amount required.

(3) When whole pieces of Government paper are required, the investor has the option of requesting, in his application, that the paper should remain in the custody of the Accountant-General, or be delivered to him. In the former case, a receipt from the Accountant-General for the paper will be delivered to the investor. When paper is to be delivered to the investor, it will be encased for payment of interest at the district treasury and be forwarded to the post office for delivery to the investor. In the case of Government securities represented by an Investment Certificate, the securities will remain in the custody of the Accountant-General, and no paper can be delivered to the investor or encased for payment of interest at the treasury.

(4) Applications for Investment Certificates and Government Promissory Notes must be made on separate forms of application prescribed by the Director-General. If the applicant is already a depositor in the Post Office Savings Bank, he should present his pass-book with his application; if he is not already a depositor, a pass-book will be prepared and delivered to him.

(5) When an application for an Investment Certificate is presented at a head or a sub-post office, an Investment Certificate, signed by the head or sub-postmaster as the case may be, will be handed to the investor *across the counter of the post office*. When the application is presented at a branch post office, an Investment Certificate will be obtained for the investor from the head office or the sub-office to which the branch office is subordinate. The Accountant-General will fix the rate at which Government securities represented by Investment Certificates can be purchased. This rate will be communicated to head and sub-postmasters and will remain in force until it is changed by the Accountant-General.

* See Notification No. 6051—6055—192, dated 12-7-1907.

(6) Two or more Investment Certificates may, at any time, be exchanged for a single certificate of their aggregate value, also, one or more Investment certificates of the nominal value of not less than R100 may at any time be exchanged for a whole piece of Government paper of R100 or any multiple of R100. The certificates to be exchanged must be presented at the local post office, entered in the appropriate form of application prescribed for the purpose by the Director-General. Separate forms are provided for exchanging—

(a) two or more certificates for a single one, and

(b) one or more certificates for a whole piece of Government paper.

(7) In each case in which an Investment Certificate is issued by a sub-office, the depositor will receive a confirmation by post from the head office showing the No., date, and nominal value of the Investment Certificate and the cash balance left at credit of the account after the transaction. If the confirmation does not reach the depositor in proper time, or if, when it reaches him, it shows any signs of erasure, or does not agree with the entries in the Investment Certificate or the pass-book, the depositor should immediately apply to the postmaster of the head office and renew his application until he receives a satisfactory reply.

(8) Applications for Government Promissory Notes presented at any post office will be forwarded to the Accountant-General, at Calcutta, who will take the necessary steps for the purchase. *The investor will be charged with the actual price paid for the Government promissory notes.* The entries in connection with the investment will be noted in the pass-book by the head office.

NOTE.—The annual limit of R1,000 and the maximum limit of R5,000 for investments through the Post Office do not apply to investments in connection with public accounts, with regimental, police, and other conjoint accounts, or with security deposit accounts.

SALE OF GOVERNMENT SECURITIES.

47. (1) Any depositor may apply for sale through the Post Office of the whole, or of any portion, of any Government securities which may have been purchased for him through the Post Office, whether held by himself or held for him by the Accountant-General, provided that, if only a portion of the Government securities is specified for sale, the nominal value of this portion must not be (a) less than R10 or (b) such a sum as would leave a balance of securities of the nominal value of less than R10.

(2) Applications for the sale of (a) Investment Certificates, and (b) Government Promissory Notes, must be made on separate forms of application prescribed by the Director-General of the Post Office. In the former case, the application must be accompanied by the Investment Certificates, and the securities will be sold at the same rate as that fixed by the Accountant-General, for the purchase of securities represented by Investment Certificates. In the latter case, such of the Government Promissory Notes to be sold as are not held by the Accountant-General, must be presented with the application endorsed in favour of the Accountant-General, and those, together with any Government Promissory Notes in the custody of that officer which are specified for sale, will be sold at the current market rate.

(3) The results of sale will be intimated to the depositor by the Accountant-General through the postmaster concerned with the least possible delay after the receipt of the application. The proceeds of sale together with any interest that may be due, will be credited to the depositor's Savings Bank account in the first instance and, if the annual or total cash limit of his account is thereby exceeded, the excess will not bear interest and must be withdrawn by the depositor. When, however, such sale-proceeds are withdrawn by the depositor before interest becomes due on them under rule 29, they will not be taken into account in calculating the annual and total cash limits of the account.

NOTE.—Securities purchased in the name and on behalf of a minor cannot be sold during the minority except by the minor's legally constituted guardian, and the definition of guardian in rule 1 of these rules does not apply to the sale of such securities

SAFE CUSTODY OF GOVERNMENT PROMISSORY NOTES.

48. (1) A depositor may tender at a Post Office Savings Bank for a safe custody by the Accountant-General, Government Promissory Notes which have been purchased for him through the Post Office. The tender must be made on the form prescribed by the Director-General, and the notes tendered must be endorsed to the Accountant-General. A receipt for the notes from the Accountant-General will be delivered to the depositor.

(2) A depositor may also, at any time, apply through the local post office for the delivery to him of any Government Promissory Notes which have been purchased for him through the Post Office. The application must be made in the form prescribed by the Director-General. The notes will be delivered to the depositor on his surrendering the receipt originally granted to him by the Accountant-General, duly endorsed in acknowledgment of his having received back the notes.

INTEREST ON GOVERNMENT SECURITIES.

49. So long as Government securities purchased through the Post Office remain in the custody of the Accountant-General, under rules 46 (3) and 48 (1) interest when due* will be drawn and advised to the local post office Savings Bank by the Accountant-General for credit to the depositor's account. If the annual or total cash limit of the account is exceeded, the excess will not bear interest.

50. No fee, commission, or brokerage of any kind is charged for the purchase, sale, safe custody or delivery out of custody of Government securities bought through the Post Office or for the realization and remittance of interest on such securities. So long as Government securities purchased through the Post Office remain in the custody of the Accountant-General, under rules 46 (3) and 48 (1), the interest thereon is exempt from income-tax.

POWER OF GOVERNMENT TO ALTER RULES.

51. The Governor-General in Council reserves the right to alter or add to these rules at any time.

* NOTE.—In the case of Government securities represented by Investment Certificates, interest will, for the present, be due on the 1st May and 1st November of each year.



GOVERNMENT SAVINGS BANKS ACT, 1873.

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ACT II OF 1912

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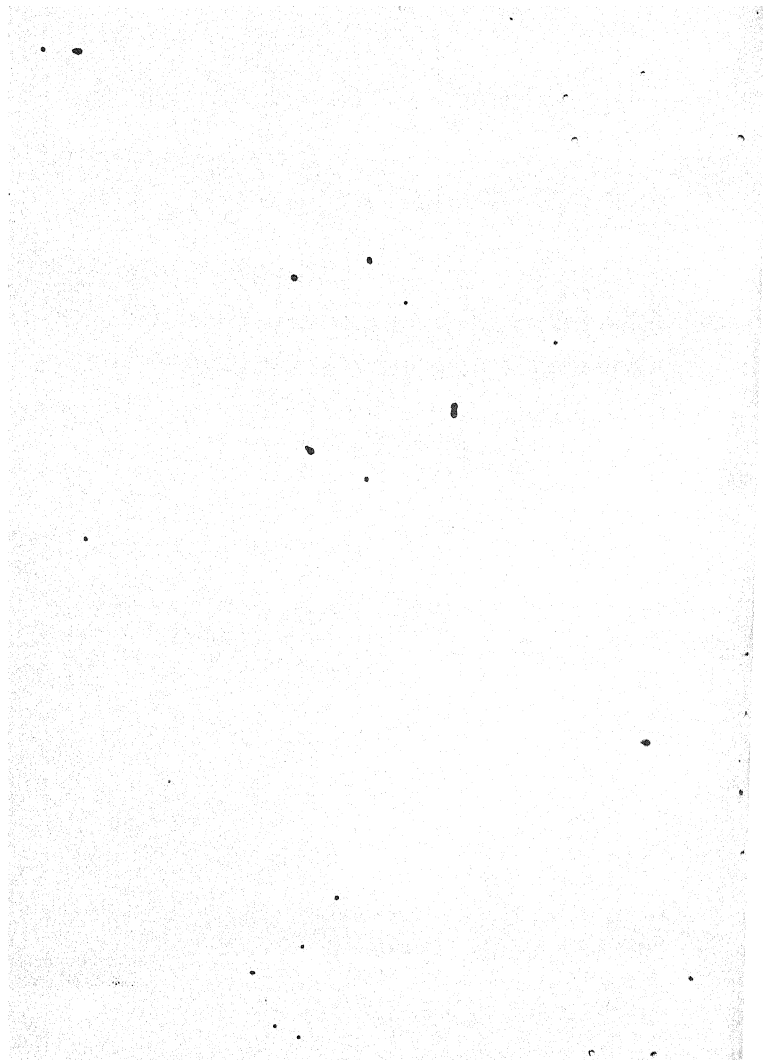
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THE CO-OPERATIVE SOCIETIES ACT.

ACT II OF 1912.

An Act to amend the Law relating to Co-operative Societies.

WHEREAS it is expedient further to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means, and for that purpose to amend the law relating to Co-operative Societies; It is hereby enacted as follows:—

Preliminary.

Short title and extent.

1. (1) This Act may be called the Co-operative Societies Act, 1912; and

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "by-laws" means the registered by-laws for the time being in force and includes a registered amendment of the by-laws;
- (b) "committee" means the governing body of a registered society to whom the management of its affairs is entrusted;
- (c) "member" includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules;
- (d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the by-laws to give directions in regard to the business of the society;
- (e) "registered society" means a society registered or deemed to be registered under this Act;
- (f) "Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act; and
- (g) "rules" means rules made under this Act.

Registration.

3. The Local Government may appoint a person to be Registrar of Co-operative Societies for the Province or any portion of it, and may appoint persons to assist such Registrar, and may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

4. Subject to the provisions hereinafter contained, a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with or without limited liability:

Provided that unless the Local Government by general or special order otherwise directs—

- (1) the liability of a society of which a member is a registered society shall be limited ;
- (2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists, and of which no member is a registered society, shall be unlimited.

Restrictions on interest of member of society with limited liability and a share capital.

5. Where the liability of the members of a society is limited by shares, no member other than a registered society shall—

- (a) hold more than such portion of the share capital of the society, subject to a maximum of one-fifth, as may be prescribed by the rules ; or
- (b) have or claim any interest in the shares of the society, exceeding one thousand rupees.

6. (1) No society, other than a society of which a member is a registered society, shall be registered under this Act which does not consist of at least ten persons above the age of eighteen years and, where the object of the society is the creation of funds to be lent to its members, unless such persons—

Conditions of registration.

- (a) reside in the same town or village or in the same group of villages ; or,
- (b) save where the Registrar otherwise directs, are members of the same tribe, class, caste or occupation.

(2) The word " limited " shall be the last word in the name of every society with limited liability registered under this Act.

7. When any question arises whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages shall be considered to form a group, or whether any person belongs to any particular tribe, class, caste or occupation, the question shall be decided by the Registrar, whose decision shall be final.

Power of Registrar to decide certain questions.

Application for registration. 8. (1) For purposes of registration an application to register shall be made to the Registrar.

(2) The application shall be signed—

- (a) in the case of a society of which no member is a registered society, by at least ten persons qualified in accordance with the requirements of section 6, sub-section (1) ; and
- (b) in the case of a society of which a member is a registered society, by a duly authorized person on behalf of every such registered society, and, where all the members of the society are not registered societies, by ten other members or, when there are less than ten other members, by all of them.

(3) The application shall be accompanied by a copy of the proposed by-laws of the society, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Registrar may require.

9. If the Registrar is satisfied that a society has complied with the Registration. provisions of this Act and the rules and that its proposed by-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its by-laws.

10. A certificate of registration signed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.
Evidence of registration.

11. (1) No amendment of the by-laws of a registered society shall be valid until the same has been registered under this Act, for which purpose a copy of the amendment shall be forwarded to the Registrar.
Amendment of the by-laws of registered society.

(2) If the Registrar is satisfied that any amendment of the by-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

(3) When the Registrar registers an amendment of the by-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

Rights and liabilities of Members.

12. No member of a registered society shall exercise the rights of a member unless or until he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or by-laws.
Member not to exercise rights till due payment made.

13. (1) Where the liability of the members of a registered society is not limited by shares, each member shall, notwithstanding the amount of his interest in the capital, have one vote only as a member in the affairs of the society.
Votes of members.

(2) Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

(3) A registered society which has invested any part of its funds in the shares of any other registered society may appoint as its proxy, for the purpose of voting in the affairs of such other registered society, any one of its members.

14. (1) The transfer or charge of the share or interest of a member in the capital of a registered society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.
Restrictions on transfer of share or interest.

4 **Act II of 1912 (THE CO-OPERATIVE SOCIETIES ACT). [Ss. 14 to 19]**

(2) In case of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless—

- (a) he has held such share or interest for not less than one year; and
- (b) the transfer or charge is made to the society or to a member of the society.

Duties of registered societies.

15. Every registered society shall have an address, registered in accordance with the rules, to which all notices and communications may be sent, and shall send to the Registrar notice of every change thereof.

Address of societies.

16. Every registered society shall keep a copy of this Act and of the rules governing such society, and of its by-laws open to inspection free of charge at all reasonable times at the registered address of the society.

Copy of Act, rules and by-laws to be open to inspection.

17. (1) The Registrar shall audit or cause to be audited by some person authorized by him by general or special order in writing in this behalf the accounts of every registered society once at least in every year.

Audit.

(2) The audit under sub-section (1) shall include an examination of overdue debts, if any, and a valuation of the assets and liabilities of the society.

(3) The Registrar, the Collector or any person authorised by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection may require.

Privileges of registered societies.

18. The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

Societies to be bodies corporate.

19. Subject to any prior claim of the Government in respect of land-revenue or any money recoverable as land-revenue or of a landlord in respect of rent or any money recoverable as rent, a registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member—

Prior claim of society.

- (a) in respect of the supply of seed or manure or of the loan of money for the purchase of seed or manure—upon the crops or other agricultural produce of such member or person at any time within eighteen months from the date of such supply or loan;

- (b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things—upon any such things so supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

20. A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society, and may set-off any sum credited or payable to a member or past member in or towards payment of any such debt.

Charge and set-off in respect of shares or interest of member.

21. Subject to the provisions of section 20, the share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1907, shall be entitled to have any claim on such share or interest.

Shares or interest not liable to attachment.

22. (1) On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member, or pay to such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws:

Transfer of interest on death of member.

Provided that—

- (i) in the case of a society with unlimited liability, such nominee, heir or legal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained as aforesaid;
- (ii) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative, as the case may be, being qualified in accordance with the rules and by-laws for membership of the society, or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified.

(2) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

6 Act II of 1912 (THE CO-OPERATIVE SOCIETIES ACT). [Ss. 23 to 28.]

23. The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

24. The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease.

25. Any register or list of members or shares kept by any registered society shall be *prima facie* evidence of any of the following particulars entered therein :—

- (a) the date at which the name of any person was entered in such register or list as a member ;
- (b) the date at which any such person ceased to be a member.

26. A copy of any entry in a book of a registered society regularly kept in the course of business, shall, if certified in such manner as may be prescribed by the rules, be received, in any suit or legal proceeding, as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is admissible.

Exemption from compulsory registration of instruments relating to shares and debentures of registered society.

27. Nothing in section 17, sub-section (1), clauses (b) and (c), of the Indian Registration Act, 1908, shall apply to—

- (1) any instrument relating to shares in a registered society, notwithstanding that the assets of such society consist in whole or in part of immoveable property ; or
- (2) any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or
- (3) any endorsement upon or transfer of any debenture issued by any such society.

Power to exempt from income-tax, stamp-duty and registration-fees.

28. The Governor-General in Council, by notification in the *Gazette of India*, may, in the case of any registered society or class of registered society, remit—

- (a) the income-tax payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits ;
- (b) the stamp-duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business

of such society, or any class of such instruments, are respectively chargeable ;

- (c) any fee payable under the law of registration for the time being in force.

Property and funds of registered societies.

Restrictions on loans. **29.** (1) A registered society shall not make a loan to any person other than a member :

Provided that, with the general or special sanction of the Registrar, a registered society may make loans to another registered society.

(2) Save with the sanction of the Registrar, a society with unlimited liability shall not lend money on the security of moveable property.

(3) The Local Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immoveable property by any registered society or class of registered societies.

30. A registered society shall receive deposits and loans from persons

Restrictions on borrowing. who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

31. Save as provided in sections 29 and 30, the transactions of a registered society with persons other than members

Restrictions on other transactions with non-members. shall be subject to such prohibitions and restrictions, if any, as the Local Government may, by rules, prescribe.

Investment of funds. **32.** (1) A registered society may invest or deposit its funds—

- (a) in the Government Savings Bank, or
- (b) in any of the securities specified in section 20 of the Indian Trusts Act, 1882, or
- (c) in the shares or on the security of any other registered society, or
- (d) with any bank or person carrying on the business of banking, approved for this purpose by the Registrar, or
- (e) in any other mode permitted by the rules.

II of 1882.

(2) Any investments or deposits made before the commencement of this Act which would have been valid if this Act had been in force are hereby ratified and confirmed.

Funds not to be divided by way of profit. **33.** No part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members :

Provided that after at least one-fourth of the net profits in any year have been carried to a reserve fund, payments from the remainder of such profits and from any profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or by-laws :

Provided also that in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the Local Government in this behalf.

34. Any registered society may, with the sanction of the Registrar, after one-fourth of the net profits in any year has been carried to a reserve fund, contribute an amount not exceeding ten per cent. of the remaining net profits to any charitable purpose, as defined in section 2 of the Charitable Endowments Act, 1890.

I of 1890.

Inspection of affairs.

35. (1) The Registrar may of his own motion, and shall on the request of the Collector, or on the application of a majority of the committee, or of not less than one-third of the members, hold an inquiry or direct some person authorized by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

(2) All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorized by the Registrar may require.

36. (1) The Registrar shall, on the application of a creditor of a registered society, inspect or direct some person authorized by him by order in writing in this behalf to inspect the books of the society:

Inspection of books
of indebted society.

Provided that—

(a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time; and

(b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

(2) The Registrar shall communicate the results of any such inspection to the creditor.

37. Where an inquiry is held under section 35, or an inspection is made under section 36, the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

38. Any sum awarded by way of costs under section 37 may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of any moveable property within the limits of the jurisdiction of such Magistrate belonging to such person.

Dissolution of society.

39. (1) If the Registrar, after an inquiry has been held under section 35 or after an inspection has been made under section 36 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be dissolved, he may cancel the registration of the society.

Dissolution.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period.

(4) Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the appellate authority.

(5) The authority to which appeals under this section shall lie shall be the Local Government :

Provided that the Local Government may, by notification in the local official Gazette, direct that appeals shall lie to such Revenue-authority as may be specified in the notification.

40. Where it is a condition of the registration of a society that it should consist of at least ten members, the Registrar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than ten.

Effect of cancellation of registration. 41. Where the registration of a society is cancelled, the society shall cease to exist as a corporate body—

(a) in the case of cancellation in accordance with the provisions of section 39, from the date the order of cancellation takes effect ;

(b) in the case of cancellation in accordance with the provisions of section 40, from the date of the order.

42. (1) Where the registration of a society is cancelled under section 39 or section 40, the Registrar may appoint a competent person to be liquidator of the society.

(2) A liquidator appointed under sub-section (1) shall have power—

(a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office ;

(b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society ;

(c) to investigate all claims against the society and, subject to the provisions of this Act, to decide questions of priority arising between claimants ;

(d) to determine by what persons and in what proportions the costs of the liquidation are to be borne ; and

(e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

(3) Subject to any rules, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.

(4) Where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge.

(5) Orders made under this section shall, on application, be enforced as follows :—

- (a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court ;
- (b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

Rules.

43. (1) The Local Government may, for the whole or any part of the Province and for any registered society or class of such societies, make rules to carry out the purposes of this Act.

Rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) subject to the provisions of section 5, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member ;
- (b) prescribe the forms to be used and the conditions to be complied with in the making of applications for the registration of a society and the procedure in the matter of such applications ;
- (c) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altering and abrogating by-laws, and the conditions to be satisfied prior to such making, alteration or abrogation ;
- (d) prescribe the conditions to be complied with by persons applying for admission or admitted as members, and provide for the election and admission of members, and the payment to be made and the interests to be acquired before the exercise of the right of membership ;
- (e) regulate the manner in which funds may be raised by means of shares or debentures or otherwise ;
- (f) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings ;
- (g) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers ;
- (h) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication

of a balance-sheet showing the assets and liabilities of a society ;

- (i) prescribe the returns to be submitted by a society to the Registrar and provide for the persons by whom and the form in which such returns shall be submitted ;
 - (j) provide for the persons by whom and the form in which copies of entries in books of societies may be certified ;
 - (k) provide for the formation and maintenance of a register of members and, where the liability of the members is limited by shares, of a register of shares ;
 - (l) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators ;
 - (m) provide for the withdrawal and expulsion of members and for the payments, if any, to be made to members who withdraw or are expelled and for the liabilities of past members ;
 - (n) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred ;
 - (o) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member ;
 - (p) provide for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society ;
 - (q) prescribe the extent to which a society may limit the number of its members ;
 - (r) prescribe the conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies ;
 - (s) subject to the provisions of section 39, determine in what cases an appeal shall lie from the orders of the Registrar and prescribe the procedure to be followed in presenting and disposing of such appeals ; and
 - (t) prescribe the procedure to be followed by a liquidator appointed under section 42, and the cases in which an appeal shall lie from the order of such liquidator.
- (3) The Local Government may delegate, subject to such conditions, if any, as it thinks fit, all or any of its powers to make rules under this section to any authority specified in the order of delegation.
- (4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

12 **Act II of 1912 (THE CO-OPERATIVE SOCIETIES ACT). [Ss. 43 to 50]**

(5) All rules made under this section shall be published in the local official Gazette and on such publication shall have effect as if enacted in this Act.

Miscellaneous.

44. (1) All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any costs awarded to the Government under section 37, may be recovered in the same manner as arrears of land-revenue.

Recovery of sums due to Government.

(2) Sums due from a registered society to Government and recoverable under sub-section (1) may be recovered, *firstly*, from the property of the society; *secondly*, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability; and, *thirdly*, in the case of other societies, from the members.

Power to exempt societies from conditions as to registration.

45. Notwithstanding anything contained in this Act, the Local Government may, by special order in each case and subject to such conditions, if any, as it may impose, exempt any society from any of the requirements of this Act as to registration.

Power to exempt registered societies from provisions of the Act.

46. The Local Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

Prohibition of the use of the word "co-operative."

47. (1) No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the Local Government:

Provided that nothing in this section shall apply to the use by any person or his successor in interest of any name or title under which he traded or carried on business at the date on which this Act comes into operation.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to fifty rupees and in the case of a continuing offence with further fine of five rupees for each day on which the offence is continued after conviction therefor.

VI of 1932,

Indian Companies Act, 1892, not to apply.

48. The provisions of the Indian Companies Act, 1882, shall not apply to registered societies.

X of 1901.

Saving of existing societies.

49. Every society now existing which has been registered under the Co-operative Credit Societies Act, 1904, shall be deemed to be registered under this Act, and its by-laws shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

X of 1904.

Repeal.

50. The Co-operative Credit Societies Act, 1904, is hereby repealed.

THE LAWYER'S COMPANION SERIES.

THE PROVIDENT INSURANCE SOCIETIES ACT

ACT V OF 1912

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

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Companion Office, Trichinopoly and Madras.*

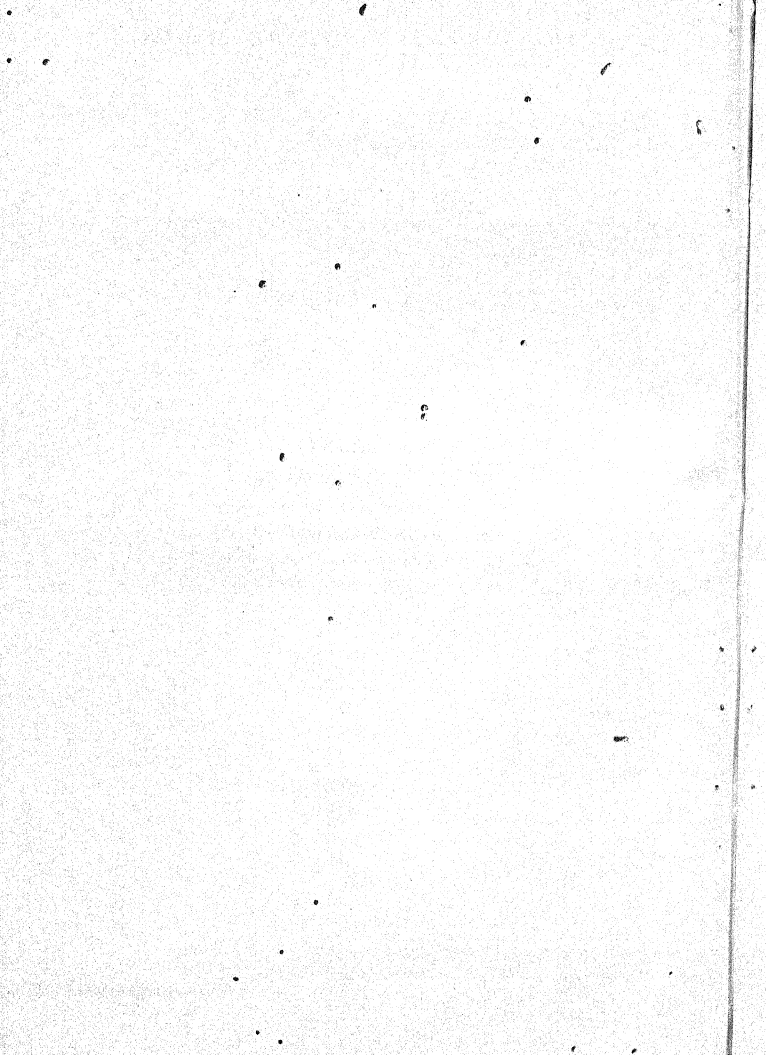
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1912.

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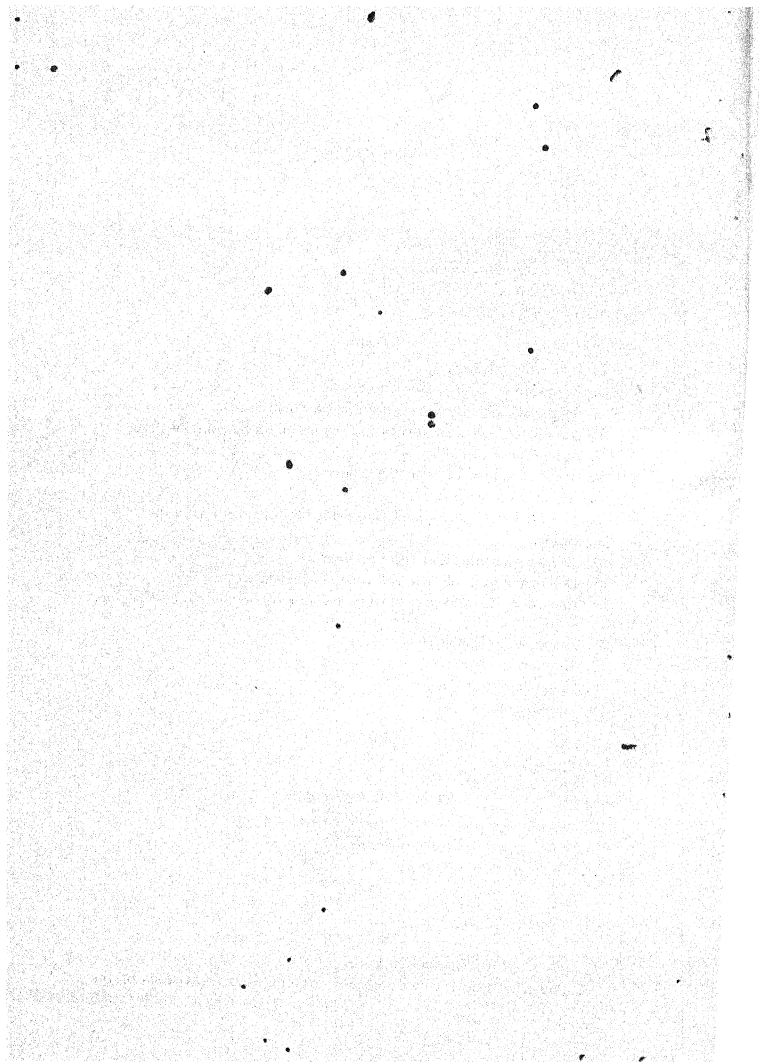
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THE PROVIDENT INSURANCE SOCIETIES ACT.

ACT V OF 1912.

An Act to provide for the regulation of Provident Insurance Societies.

WHEREAS it is expedient to provide for the regulation of Provident Insurance Societies; It is hereby enacted as follows :—

Preliminary.

Short title and extent. 1. (1) This Act may be called the Provident Insurance Societies Act, 1912; and

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in the exercise of its ordinary original civil jurisdiction :

(2) "financial year" means each period of twelve months at the end of which the balance of the accounts of any Provident Insurance Society is struck, or, if no such balance is struck, then the calendar year :

(3) "life assurance business" means the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life :

(4) "policy of assurance on human life" means any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life :

(5) "policy-holder" means the person who for the time being is the legal holder of the policy for securing the contract with the Provident Insurance Society :

(6) where a Provident Insurance Society grants annuities upon human life, "policy" includes the instrument evidencing the contract to pay such an annuity, and "policy-holder" includes annuitant :

(7) "prescribed" means prescribed by rules made under this Act :

(8) "Provident Insurance Society" means any person who, or body of persons whether corporate or unincorporate which, receives premiums or contributions for insuring money to be paid on the birth, marriage or

death of any person or on the happening of such other contingency or class of contingency as may be prescribed : and

(9) "Registrar" means any person who may be appointed by the Local Government to perform the duties of the Registrar under this Act.

3. Nothing in this Act shall apply to any Provident Insurance Society carrying on life assurance business which undertakes to pay on any life assurance policy or series of life assurance policies on any one life, an annuity exceeding fifty rupees or a gross sum exceeding five hundred rupees, or which receives or undertakes to receive by way of premium or contribution for life assurance on any one life any sum exceeding two hundred and fifty rupees where the said premiums or contributions are payable for one year or a limited number of years, or exceeding twenty-five rupees in any one year where the premiums or contributions are unlimited in number and terminable on death or the occurrence of an uncertain event :

Provided that in determining whether this Act applies to any Provident Insurance Society, carrying on life insurance business, contracts entered into by the society before the commencement of this Act shall not be taken into consideration.

General.

4. No Provident Insurance Society shall receive any premium or contribution for insuring money to be paid on the death of any person other than the person paying such premium or contribution, or the wife, husband, child, parent, brother or sister of such person.

Provision to be made by rules. 5. Every Provident Insurance Society shall by its rules—

- (a) specify the object, name and registered office of the society ;
- (b) prescribe the proportion of the annual income of the society derived from premiums or contributions which may be disbursed for the expenses of management of the society ;
- (c) in the case of a society which by rule or practice divides any part of the funds thereof, provide for the payment of all debts due by the society existing at the time of division before any such division has taken place ; and
- (d) provide for any other matters which may be proscribed.

6. (1) Every Provident Insurance Society shall, within three months from the commencement of this Act, or, if established after the commencement of this Act, before it receives any premium or contribution, apply to the Registrar for that part of British India in which the office of the society is situate for registration under this Act, and shall deliver to him a copy of the rules of the society.

(2) The Registrar shall, on being satisfied that such rules comply with the provisions of this Act, acknowledge the receipt of the rules and register the society and its rules.

(3) If the Registrar is not satisfied that the rules or any of them comply with the provisions of this Act, he shall send to the Provident

Insurance Society a notice by post stating in what respect such rule or rules is or are not in accordance with the provisions of this Act, and calling upon such society to deliver to him an amended rule or rules within sixty days.

(4) On receipt of a notice under sub-section (3) the Provident Insurance Society may within sixty days deliver to the Registrar an amended rule or rules in conformity with this Act, and the Registrar shall thereupon acknowledge the receipt of the rules and register the society and its rules as hereinbefore provided.

Unregistered society not to receive premium or contribution. 7. No provident insurance society shall receive any premium or contribution unless it is registered in accordance with the provisions of this Act:

Provided that this prohibition shall only apply to a society established before the commencement of this Act—

(a) when such society has applied for registration in accordance with the provisions of section 6, sub-section (1)—from the date of the order of the Registrar refusing registry;

(b) when such society has not applied as aforesaid—after three months from the commencement of this Act.

8. (1) No amendment of any rule of a Provident Insurance Society shall be valid until the same has been registered under this Act, for which purpose a copy of the amended rule shall be sent to the Registrar.

(2) The Registrar shall, on being satisfied that any amendment of a rule is not contrary to the provisions of this Act, issue to the society an acknowledgment of the registration of the same.

9. Every Provident Insurance Society shall, on demand, deliver free of cost to any member of the society a copy of the rules of the society, and to any person other than a member a copy of such rules on the payment of a sum not exceeding one rupee.

10. Every Provident Insurance Society which is not registered under the Indian Companies Act, 1882, shall cause to be kept in the prescribed form a register of the names and addresses of its members.

11. Where any notice, advertisement or other official publication of a Provident Insurance Society contains a statement of the amount of the authorised capital of the society, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

12. Every Provident Insurance Society which is not registered under the Indian Companies Act, 1882, shall have an office on the outside of which it shall display and keep displayed its name in a conspicuous position in legible letters, to which all communications and notices may be addressed, and shall give notice to the Registrar of the situation of such office and of any change therein.

13. Every Provident Insurance Society shall, at the expiration of each financial year, prepare a revenue account and balance-sheet in the prescribed form and verified in the prescribed manner, and shall cause them to be audited by an auditor possessing the prescribed qualifications.

14. Every Provident Insurance Society shall, within six months of the expiration of each financial year, deliver to the Registrar the revenue-account and balance-sheet required by section 13 and shall publish them in the prescribed manner.

15. Every Provident Insurance Society shall maintain in the prescribed form a record of every insurance effected on a life other than the life of the person insuring, and shall deliver a copy of such record, to the Registrar together with the balance-sheet and revenue-account.

16. The books of every Provident Insurance Society shall at all reasonable hours be open to inspection by the Registrar, or by any person appointed by him in this behalf or by any member of the society.

17. (1) The Registrar may, if he thinks fit, of his own motion, and shall, upon the application of ten or more members or policy-holders of a Provident Insurance Society, hold or direct an inquiry to be held by an actuary possessing the prescribed qualifications appointed by him by order in writing in this behalf as to the solvency of any Provident Insurance Society or as to the manner in which the business of any such society is conducted.

(2) An application to the Registrar under sub-section (1) shall be supported by such evidence as the Registrar may require for the purpose of showing that the applicants have good reason for applying for an inquiry.

(3) The Registrar may require the applicants under sub-section (1) to give such security as he thinks fit for the costs of the proposed inquiry before such an inquiry is held.

(4) All expenses of and incidental to or preliminary to any inquiry made on application as aforesaid shall be defrayed by the applicants therefor or out of the funds of the society or by the members or officers of the society in such proportions as the Registrar may direct by order in writing.

(5) An order made under sub-section (4) shall on application be enforced by any Civil Court having local jurisdiction in the same manner as a decree of such Court.

(6) A person holding an inquiry under this section shall have access to all the books and documents of the society, and shall have power to call upon the society and the officers of the society to furnish such statements and other information in relation to its business as he may direct.

(7) The result of the inquiry shall be communicated to the society and to the applicants (if any).

Ss. 18 to 20] Act V of 1912 (PROVIDENT INSURANCE SOCIETIES). 5

Cancellation of registry. 18. When an inquiry has been held under section 17, the Registrar may, if he is satisfied—

- (a) that the society is insolvent, or must necessarily become so, or
- (b) that the business of any such society is conducted fraudulently or not in accordance with the rules thereof,

after giving previous notice in writing in such manner as he thinks fit specifying briefly the grounds of the proposed cancellation, cancel the registry of the society.

19. (1) Where the registry of a Provident Insurance Society is cancelled in accordance with the provisions of sec. 18, the Registrar may appoint a liquidator to wind up the society.

(2) A liquidator appointed under sub-section (1) shall have power—

- (a) to institute or defend any legal proceedings on behalf of the society by his name of office;
- (b) to determine the contribution to be made by members of the society, respectively, to the assets of the society;
- (c) to investigate all claims against the society and to decide questions of priority arising between claimants;
- (d) to determine by what persons and in what proportions the costs of the liquidation are to be borne; and
- (e) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society.

(3) Subject to any rules of procedure made under this Act, a liquidator appointed under this section shall, in so far as such powers are necessary to carry out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of a Civil Court by the Code of Civil Procedure, 1908.

V of 1908.

(4) Orders made under this section shall on application be enforced as follows :—

- (a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court;
- (b) when made by the Court on appeal, in the same manner as a decree of the Court.

Appeals.

Appeals. 20. (1) An appeal shall lie to the Court within thirty days—

- (a) from an order of the Registrar refusing to register a Provident Insurance Society or any rules or amendments of rules of such society;
- (b) from an order of the Registrar cancelling the registry of a society;
- (c) from an order made by a liquidator appointed under section 19.

(2) Save as hereinbefore expressly provided, orders made under this Act shall be final and conclusive.

Offences and Procedure.

21. Any Provident Insurance Society which makes default in complying with any of the requirements of this Act, and every director, manager or secretary, or other officer or agent of the society, who is knowingly a party to the default, shall be punishable with fine which may extend to five hundred rupees, or, in the case of a continuing default, with fine which may extend to two hundred and fifty rupees for every day during which the default continues.

22. If any register, account, balance-sheet or other document required by this Act is false in any particular to the knowledge of any person who signs it, such person shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

23. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

Rules.

24. (1) The Local Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

- (a) contingencies or classes of contingencies and thereby extend the application of this Act to the receipt of premiums or contributions for insuring money to be paid on the happening of such contingencies or class of contingencies;
- (b) the matters in respect of which a society shall make rules;
- (c) the form of any account, return or register required by this Act, and the manner in which any such account, return or register shall be verified;
- (d) the fees to be charged for matters transacted under this Act and the manner in which the same are to be collected;
- (e) the qualifications of auditors and actuaries under this Act;
- (f) the manner in which any document required to be published by this Act shall be published; and
- (g) the procedure to be followed by liquidators under this Act.

(3) The power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication.

(4) All rules made under this Act shall be published in the local official Gazette, and on such publication shall have effect as if enacted therein.

Miscellaneous.

25. No policy effected before the commencement of this Act with a Provident Insurance Society shall be deemed to be void by reason only that the insurance is not authorized by this Act.

26. The Local Government may, by notification in the local official Gazette and subject to such conditions and restrictions as it thinks fit, exempt any Provident Insurance Society or class of Provident Insurance Societies from all or any of the provisions of this Act.

THE LAWYER'S COMPANION SERIES.

THE INDIAN LIFE ASSURANCE COMPANIES ACT

ACT VI OF 1912

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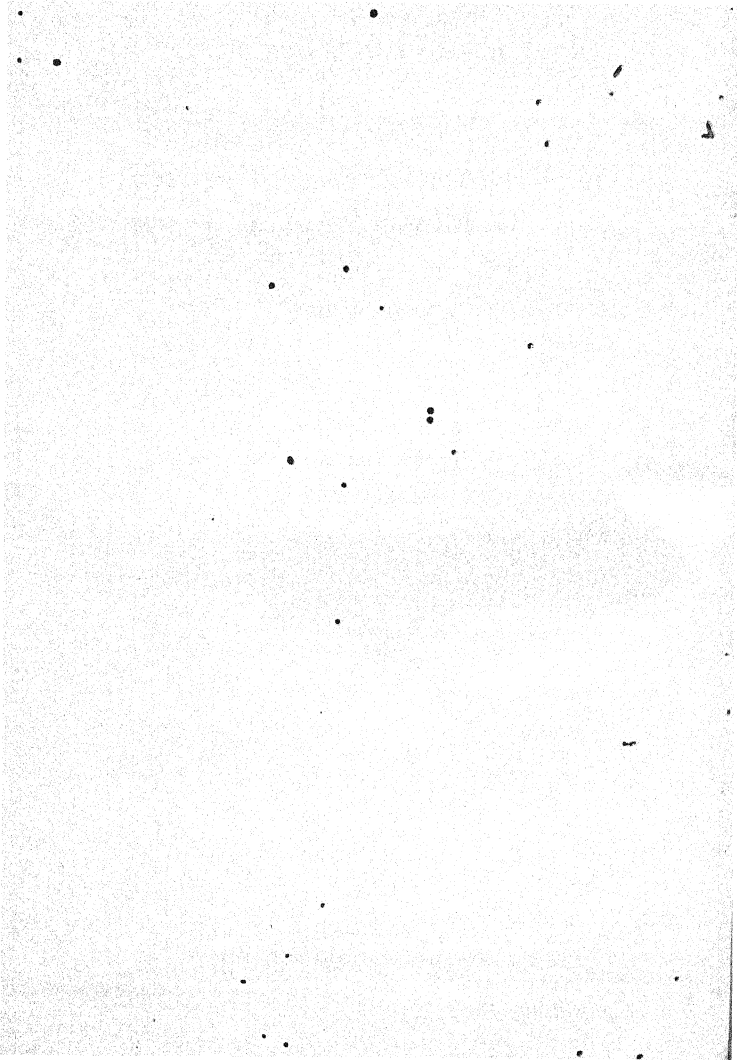
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THE INDIAN LIFE ASSURANCE COMPANIES ACT. 1912.

ACT VI OF 1912.

An Act to provide for the regulation of Life Assurance Companies.

WHEREAS it is expedient to provide for the regulation of life assurance companies; It is hereby enacted as follows:—

Preliminary.

Short title and extent.

1. (2) This Act may be called the Indian Life Assurance Companies Act, 1912.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "actuary" means an actuary possessing such qualifications as may be prescribed by rules made by the Governor General in Council:

(2) "chairman" means the person for the time being presiding over the board of directors or other governing body of a life assurance company:

(3) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in the exercise of its ordinary original civil jurisdiction:

(4) "financial years" means each period of twelve months at the end of which the balance of the accounts of the life assurance company is struck, or, if no such balance is struck, then the calendar year:

(5) "life assurance business" means the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life:

(6) "policy of assurance on human life" means any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life:

(7) "policy-holder" means the person who for the time being is the legal holder of the policy for securing the contract with the life assurance company:

(8) where a company grants annuities upon human life, "policy" includes the instrument evidencing the contract to pay such an annuity, and "policy-holder" includes annuitant: and

(9) "Registrar" means any person who may be appointed by the Local Government to perform the duties of the Registrar under this Act.

3. Save as hereafter expressly provided, this Act shall apply to all Companies to persons or bodies of persons, whether corporate or which Act applies. unincorporate (which persons and bodies of persons are hereafter referred to as life assurance companies) whether established before or after the commencement of this Act and whether established within or without British India, who carry on life assurance business within British India.

VI of 1892. *Explanation.*—A company registered under the Indian Companies Act, 1882, which carries on life assurance business in any part of the world shall for the purposes of this section be deemed to be a company carrying on such business within British India.

Exception.—Nothing in this Act shall apply to any society to which the Provident Insurance Societies Act, 1912, applies, or to any Fund which the Governor General in Council may, by notification in the *Gazette of India*, exempt from the operation of this Act.

Deposits.

XIII of 1886, 4 (1) Every life assurance company shall, if established before the commencement of this Act, within one year from such Deposit. commencement, or, if established after such commencement, before it commences to carry on the business of life assurance, deposit and keep deposited with the Comptroller General, for and on behalf of the Governor General in Council, Government securities, as defined by the Indian Securities Act, 1886, of the face value of twenty-five thousand rupees or of a face value equal to one-third of the income derived from life assurance business as shown in the revenue account for the last financial year, whichever is greater; and, until the company keeps deposited securities of the face value of two hundred thousand rupees, shall annually deposit and keep deposited in like manner like securities of a face value—

(a) equal to one-third of the income derived from life assurance business as shown in the revenue account for the last financial year, until the face value of the securities deposited exceeds one hundred thousand rupees;

(b) and thereafter equal in amount to one-third of the increase to the life assurance fund as shown in the revenue account for the last financial year:

Provided that a company may at any time deposit securities of a face value of two hundred thousand rupees or make up its deposit of securities to that value.

(2) The interest accruing due on the securities deposited under sub-section (1) shall be paid to the company.

(3) The deposit may be made by the subscribers of the memorandum of association of a company or any of them, in the name of a proposed company, and, upon the incorporation of the company, shall be deemed to have been made by, and to be part of the assets of, the company, and the Registrar of Joint Stock Companies shall not issue a certificate of incorporation of the company under the Indian Companies Act, 1882, VI of 1882, until the deposit has been made.

(4) The deposit shall be deemed to form part of the life assurance fund of the company.

Accounts and Documents.

5. In the case of a life assurance company transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance business, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund.

Explanation.—Nothing in this section shall be deemed to require any life assurance fund to be invested in separate investments from any other fund, but a separate balance-sheet as prescribed under section 7 shall be kept in respect of the life assurance fund.

Exception.—Nothing in this section shall apply to a life assurance company established before the commencement of this Act, by the terms of whose deed of settlement the whole of the profits of all the business carried on by the company are paid exclusively to the life policy-holders, and on the face of whose life policies the liability of the life assurance fund in respect of the other business distinctly appears.

6. The life assurance fund shall be as absolutely the security of the life policy-holders as though it belonged to a company carrying on no other business than life assurance business, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance, and shall not be applied, directly or indirectly, for any purposes other than those of life assurance.

Exception.—Nothing in this section shall affect the liability of the life assurance fund, in the case of a company established before the commencement of this Act, for contracts entered into by the company before such commencement.

Accounts and balance sheets. 7. Every life assurance company shall, at the expiration of each financial year, prepare—

- (a) a revenue account for the year in the form or forms set forth in the First Schedule and applicable to the class or classes of business carried on by the company;
- (b) a profit and loss account in the form set forth in the second Schedule, except where the company carries on life assurance business only and no other business;
- (c) a balance-sheet or balance-sheets in the form or forms, set forth in the Third Schedule;

- (d) a statement containing the name of every person who during the year was a member of the board of directors or other governing body or was manager or secretary or held any similar office by whatever name called.

8. (1) Every life assurance company shall once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form set forth in the Fourth Schedule.

(2) The provision of sub-section (1) regarding the making of an abstract shall also apply whenever at any other time an investigation into the financial condition of a life assurance company is made with a view to the distribution of profits, or whenever the results of any such investigation are made public.

9. In the case of mutual life assurance company whose profits are allocated to members wholly or mainly by annual abatements of premium, the abstract of the report of the actuary on the financial condition of the company, prepared in accordance with the Fourth Schedule, may, notwithstanding anything in section 8, be made and returned at intervals not exceeding five years: Provided that, where such return is not made annually, it shall include particulars as to the rates of abatement of premiums applicable to different classes or series of assurances allowed in each year during the period which has elapsed since the previous return under the Fourth Schedule.

10. Every life assurance company shall, within three years from the commencement of this Act, and thereafter at the date to which the accounts of the company are made up for the purposes of the investigation prescribed by section 8, prepare a statement of its assurance business in the form set forth in the Fifth Schedule: Provided that, if the investigation is made annually by any company, the company may prepare such a statement at any time, so that it be made at least once in every five years.

11. (1) Every account, balance-sheet, abstract or statement heretofore required to be made shall be printed, and four copies thereof, one of which shall be signed by the chairman and two directors of the company, and by the principal officer of the company, and if the company has a managing director, by the managing director, shall be deposited with the Governor General in Council within six months in the case of accounts and balance-sheets required by section 7, and within one year in other cases after the close of the period to which the account, balance-sheet, abstract or statement relates: Provided that, if in any case it is made to appear to the Governor General in Council that the circumstances are such that a longer period should be allowed, he may extend that period by such period as he may think fit.

(3) The Governor General in Council shall consider any document deposited in accordance with the provisions of sub-section (1), and, if any such document appears to the Governor General in Council to be inaccurate or defective in any respect, the Governor General in Council may call upon the company to furnish a further statement correcting any such inaccuracies or supplying any such deficiencies.

12. There shall be deposited with every revenue account and balance-sheet of a life assurance company every report on the Deposit of report. affairs of the company submitted to the share-holders or policy-holders of the company in respect of the financial year to which the account and balance-sheet relate.

13. Where a life assurance company registered under the Indian Companies Act, 1882, in any year deposits its accounts and balance-sheet in accordance with the provisions of section 11, the company may, at the same time, send to the Registrar of Joint Stock Companies a copy of such accounts and balance-sheet; and, where such copy is so sent, it shall not be necessary for the company to file a balance-sheet with the Registrar of Joint Stock Companies as required by section 74 of the Indian Companies Act, 1882, and the copy of the accounts and balance-sheet so sent shall be dealt with in all respects as if it were a balance-sheet filed in accordance with that section. VI of 1882.

14. A printed copy of the accounts, balance-sheet, abstract or statement last deposited shall, on the application of any Right of share-holders, etc., to copies of accounts, etc. share-holder or policy-holder of the company, be forwarded to him by the company by post or otherwise.

15. The accounts of every life assurance company shall be audited annually in such manner as the Governor-General in Council may prescribe. VI of 1882.

16. Every life assurance company which is not registered under the Indian Companies Act, 1882, shall keep a list of the names and addresses of its share-holders, and shall, on the application of any share-holder or policy-holder of the company, furnish to him a copy of such list on payment of a sum not exceeding two annas for every hundred words required to be copied. VI of 1882.

17. Every life assurance company which is not registered under the Indian Companies Act, 1882, shall cause a sufficient number of copies of its deed of settlement or other instrument constituting the company to be printed, and shall, on the application of any share-holder or policy-holder of the company, furnish to him a copy of such deed of settlement or other instrument on payment of a sum not exceeding one rupee. VI of 1882.

18. Where any notice, advertisement or other official publication of a life assurance company contains a statement of the amount of the authorized capital of the company, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up. VI of 1882.

19. (1) Every life assurance company, constituted outside British India which establishes a place of business within British India, or appoints an agent in British India with the object of obtaining life assurance business shall, within three months from the establishment of the place of business or the appointment of such agent, file with the Registrar—

Requirements as to companies established outside British India.

- (a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) a list of the directors of the company;
- (c) the names and addresses of some one or more persons resident in British India authorized to accept on behalf of the company service of process and any notices required to be served on the company;

and, in the event of any alteration being made in any such instrument or in the list of directors or in the names and addresses of such persons as aforesaid, the company shall, within such time as the Governor General in Council may prescribe, file with the Registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) There shall be paid to the Registrar for registering any document, required by this section to be filed, a fee of five rupees or such smaller fee as the Governor General in Council may prescribe.

Amalgamation or Transfer.

20. (1) Where it is intended to amalgamate two or more life assurance companies, or to transfer the life assurance business of one company to another, the directors of any one or more of such companies may apply to the Court, by petition, to sanction the proposed arrangement.

Amalgamation or transfer.

(2) Before any such application is made to the Court—

- (a) notice of the intention to make the application shall be published in the Gazette of India and in the local official Gazette of the Province in which the principal place of business of the company is situate at least two months before the application is made;
- (b) a statement of the nature of the amalgamation or transfer, as the case may be together with an abstract containing the material facts embodied in the agreement or deed under which the amalgamation or transfer is proposed to be effected, and copies of the actuarial or other reports upon which the agreement or deed is founded, including a report by an independent

actuary, shall, unless the Court otherwise directs, be transmitted to each policy-holder of each company; and

- (c) the agreement or deed under which the amalgamation or transfer is effected shall be open for the inspection of the policy-holders and share-holders at the offices of the companies for a period of fifteen days after the last publication of the notice.

(3) The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.

(4) The Court shall not sanction the amalgamation or transfer in any case in which it appears to the Court that the life policy-holders representing one-tenth or more of the total amount assured in any company which it is proposed to amalgamate, or in any company the business of which it is proposed to transfer, dissent from the amalgamation or transfer.

(5) No life assurance company shall amalgamate with another, or transfer its business to another, unless the amalgamation or transfer is sanctioned by the Court in accordance with this section.

21. Where an amalgamation takes place between any life assurance companies, or where any life assurance business of one such company is transferred to another company, the combined company or the purchasing company, as the case may be, shall, within one month from the date of the completion of the amalgamation or transfer, deposit with the Governor General in Council—

Statement in case of amalgamation or transfer.

- (a) certified copies of statements of the assets and liabilities of the companies concerned in such amalgamation or transfer, together with a statement of the nature and terms of the amalgamation or transfer; and
- (b) a certified copy of the agreement or deed under which the amalgamation or transfer is effected; and
- (c) certified copies of the actuarial or other reports upon which that agreement or deed is founded; and
- (d) a declaration under the hand of the chairman of each company, and the principal officer of each company, that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth, and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer.

Winding up.

Special provisions as to winding up of assurance companies.

22. The Court may order the winding up of a life assurance company, in accordance with the Indian Companies Act, 1882, and the provisions of that Act VI of 1882. shall apply accordingly, subject, however, to the modification that the company may be ordered to be wound up—

(a) on the petition of ten or more policy-holders :

Provided that such a petition shall not be presented except by the leave of the Court, and leave shall not be granted until a *prima facie* case has been established to the satisfaction of the Court, and until security for costs for such amount as the Court may think reasonable has been given ; or

(b) on application made on behalf of the Governor General in Council, showing that from a consideration of the documents deposited with him under the provisions of this Act it appears to him that the company is insolvent.

23. (1) Where a life assurance business or any part of the life assurance business of a life assurance company has been transferred to another company under an arrangement in pursuance of which the first-mentioned company (in this section called the subsidiary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section called the principal company), then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the subsidiary company to be wound up in conjunction with the principal company, and may by the same or any subsequent order appoint the same person to be liquidator for the two companies, and make provision for such other matters as may seem to the Court necessary, with a view to the companies being wound up as if they were one company.

(2) The commencement of winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the subsidiary company.

(3) In adjusting the rights and liabilities of the members of the several companies between themselves, the Court shall have regard to the constitution of the companies, and to the arrangements entered into between the companies, in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company, or as near thereto as circumstances admit.

(4) Where any company alleged to be subsidiary is not in process of being wound up at the same time as the principal company to which it is subsidiary, the Court shall not direct the subsidiary company to be wound up unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the court is of opinion that the company is subsidiary to the principal company, and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any subsidiary company in conjunction with a principal company by any creditor of, or person interested in, the principal or subsidiary company.

(6) Where a company stands in the relation of a principal company to one company, and in the relation of a subsidiary company to some other company, or where there are several companies standing in the

relation of subsidiary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles laid down in this section.

24. Where a life assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy or of a liability under a policy requiring to be valued in such winding up shall be estimated in manner applicable to policies and liabilities provided by the Sixth Schedule.

25. The rules in the Sixth Schedule shall be of the same force, and may be repealed, altered or amended as if they were rules made in pursuance of section 254 of the Indian Companies Act, 1882, and rules may be made under VI of 1882. that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of life assurance companies.

26. The Court, in the case of a life assurance company which has been proved to be unable to pay its debts, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as it thinks just, in place of making a winding-up order.

Special Provisions relating to Accounts and Documents.

27. The Governor General in Council may direct any documents deposited with him under this Act, or certified copies thereof, to be kept by the Registrar or by any other officer appointed in this behalf, and any such documents and copies shall be open to inspection, and copies thereof may be procured by any person on payment of such fees as the Governor General in Council may direct.

28. The Governor General in Council shall annually publish in the Gazette of India and cause to be published in the local official Gazette of the Province in which the life assurance company has its principal place of business the accounts, balance-sheets, abstracts, statements and other documents under this Act, or purporting to be under this Act, deposited with him during the preceding year, except reports on the affairs of life assurance companies submitted to the share-holders or policy-holders thereof, and may append to such accounts, balance-sheets, abstracts, statements or other documents any note of the Governor General in Council thereon and any correspondence in relation thereto.

29. Every document deposited under this Act with the Governor General in Council, and certified by the Registrar or by any person appointed in that behalf by the Governor General in Council to be a document so deposited, shall be deemed to be a document so deposited.

30. Every document purporting to be certified by the Registrar, or by any person appointed in that behalf by the Governor General in Council, to be a copy of a document so deposited, shall be deemed to be a copy of that document,

and shall be received in evidence as if it were the original document unless some variation between it and the original document be proved.

31. The Governor General in Council may, on the application or with the consent of a life assurance company, alter the forms contained in the Schedule to this Act as respects that company, for the purpose of adopting them to the circumstances of that company.

Companies carrying on business in the United Kingdom.

9 Edw. VII.
Cap. 49.

32. (1) An assurance company which carries on life assurance business in the United Kingdom in accordance with the Assurance Companies Act, 1909, may, if carrying on life assurance business in British India before the commencement of this Act within three months of such commencement, or, in any other case, before it commences to carry on life assurance business in British India, apply to the Governor General in Council for a declaration that it so carries on such business in the United Kingdom.

(2) A company applying under the provisions of sub-section (1) shall furnish at the time of its application or at such further time as the Governor General in Council may prescribe, such evidence as he may direct of the facts alleged in its application.

9 Edw. VII.
Cap. 49.

(3) Where the Governor General in Council is satisfied that a life assurance company applying as aforesaid is a life assurance company which carries on business in the United Kingdom in accordance with the Assurance Companies Act, 1909, he shall, by notification in the Gazette of India, make a declaration to that effect, and shall cause such notification to be republished in the local official Gazette of the Province where the company has or proposes to have its principal place of business.

Application of the Act to companies which carry on life Assurance business in the United Kingdom.

33. Where the Governor General in Council has notified a declaration in accordance with the provisions of section 32 in respect of a life assurance company, nothing in section 4, section 5, sections 7 to 12, sections 15, 20, 21, or 37 shall apply to the Company:

Provided that—

9 Edw. VII.
Cap. 49.

(1) the company shall deposit with the Governor General in Council in the manner prescribed in section 11, copies of every account, balance-sheet, abstract, statement or other document which the company is required by the Assurance Companies Act, 1909, to deposit at the Board of Trade;

9 Edw. VII.
Cap. 49.

(2) if, at any time, a company in respect of which a declaration has been notified under section 32 ceases to carry on life assurance business in the United Kingdom in accordance with the provisions of the Assurance Companies Act, 1909, it shall, if it continues to carry on life assurance business in British India, be subject to all the provisions of this Act from the date it ceased to carry on such business in the United Kingdom in accordance with the said Act.

Penalties and Procedure.

34. Any life assurance company which makes default in complying with any of the requirements of this Act, and every director, manager or secretary, or other officer or agent of the company who is knowingly a party to the default, shall be punishable with fine which may extend to one thousand rupees, or, in the case of a continuing default, with fine which may extend to five hundred rupees for every day during which the default continues; and, if default continues for a period of three months after notice of default by the Governor General in Council (which notice shall be published in one or more newspapers as the Governor General in Council may, upon the application of one or more policy-holders or share-holders, direct) the default shall be a ground on which the Court may order the winding up of the company, in accordance with the Indian Companies Act, 1882.

VI of 1882.

35. If any account, balance-sheet, abstract, statement or other document required by this Act is false in any particular to the knowledge of any person who signs it, such person shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

Penalty for falsifying statements, etc.

36. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

Cognizance of offences.

Miscellaneous.

37. (1) The Governor General in Council may appoint one or more inspectors to examine into the affairs of any life assurance company, and to report thereon in such manner as he may direct—

Appointment of inspectors.

(i) in the case of a life assurance company which is not registered under the Indian Companies Act, 1882, upon the application—

VI of 1882.

(a) of share-holders being in number not less than one-fifth of the whole number of persons for the time being entered on the list of share-holders kept in accordance with the provisions of section 16; or

(b) of twenty or more policy-holders owning policies of an aggregate value of not less than twenty thousand rupees;

(ii) in any case where a life assurance company has failed to furnish a further statement when required to do so under the provisions of sec. 11, sub-section (2), or where the Governor General in Council is of opinion that any such further statement is insufficient or unsatisfactory.

(2) On an appointment being made under sub-section (1), the provisions of section 84 of the Indian Companies Act, 1882, shall apply to the examination made by such inspectors.

VI of 1882.

38. Any notice or other document which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy

Service of notices.

are usually sent, and any notice so addressed and sent shall be deemed and taken to be notice to the holder of such policy :

Provided that where any person claiming to be interested in a policy has given to the company notice in writing of his interest, any notice which is by this Act required to be sent to policy-holders shall also be sent to such person at the address specified by him in his notice.

Powers to make rules. 39. (1) The Governor General in Council may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the qualifications to be possessed by actuaries, auditors and inspectors under this Act, and the manner in which the accounts of life assurance companies shall be audited ;

(b) prescribe the time within and the form in which notice of alteration of the particulars specified in section 19 of the Act shall be filed with the Registrar ;

(c) subject to the provisions of this Act, prescribe the fees payable thereunder.

(3) All rules made under this Act shall be published in the Gazette of India, and on such publication, shall have effect as if enacted in this Act.

Power of Governor General in Council to delegate to local Governments the powers conferred by this Act.

40. The Governor General in Council may, by notification in the Gazette of India, and subject to such conditions and restrictions as he thinks fit, delegate to any local Government all or any of the powers (other than the power to make rules under section 39) conferred on him by this Act.

Power of Governor General in Council to exempt from the provisions of the Act.

41. The Governor General in Council may, by notification in the Gazette of India, and subject to such restrictions and conditions as he thinks fit, exempt any life assurance company from all or any of the provisions of this Act.

Amendment of Act VI of 1882, VI, 1882, sec. 131.

42. In section 131 of the Indian Companies Act, 1882, the words from "In the case of a life assurance company" to "unable to pay its debts" are hereby repealed.

THE FIRST SCHEDULE.

(See section 7.)

REVENUE ACCOUNTS OF THE——— FOR THE YEAR ENDING———

(A)—Life Assurance Account.

	RS.		RS.
		Dividends payable on 19 for the year ending 19 (This is only to be stated here by companies not supplying a profit and loss account).	
Amount of life assurance fund at the beginning of the year.		Claims under policies paid and out- standing—	
		By death	
		By maturity	
Premiums		Surrenders, including surrenders of bonus additions.	
		Annuities	
		Bonuses in cash	
		Bonuses in reduction of premiums.	
Consideration for annuities granted* (see Note 1).		Expenses of management :—	
		Commission	
		Agents' and Canvassers' allow- ances	
		Salaries, etc. (other than to Agents and Canvassers) ...	
		Travelling expenses	
		Directors' fees	
		Auditors' fees	
		Medical fees	
Interests, dividends and rents	RS.	Rents for offices belonging to and occupied by the company.	
		Rents of other offices occupied by the company.	
Less income-tax there- on		Law charges	
		Advertising	
		Printing and stationery ...	
		Other expenses of management (accounts to be specified).	
Other receipts (accounts to be specified)		Other payments (accounts to be specified).	
		Amount of life assurance fund at the end of the year, as per Third Schedule.	
	RS.		RS.

* NOTE 1.—Companies having a separate annuity fund with investments separate from those of the life assurance fund to return the particulars of their annuity business in a separate statement, in Form B of this Schedule.

NOTE 2.—Items in this account to be net amounts after deduction of the amounts paid and received in respect of re-assurances of the company's risks.

NOTE 3.—If any sum has been deducted from the expenses of management account, and taken credit for in the balance-sheet as an asset, the sum so deducted to be separately shown in the above account.

(B)—Revenue Account applicable to annuity business of those companies having a separate annuity fund, the investments of which are kept separate from those of the life assurance fund.

	RS.		RS.
Amount of annuity fund at the beginning of the year.		Annuities	
Consideration for annuities granted		Surrenders	
Interest, dividends and rents	RS.	Expenses of management :—	
Less income-tax thereon ...		Commission	
		Other expenses (to be specified) ...	
Other receipts		Other payments (accounts to be specified)	
		Amount of annuity fund at the end of the year as per balance-sheet.	
	RS.		RS.

NOTE.—Items in this account to be net amounts after deduction of the amounts paid and received in respect of reassurances of the company's risks.

(C)—General Revenue Account applicable to all classes of business other than life assurance and annuity transactions.

	RS.		RS.
Amount of funds at the beginning of the year		Claims less reassurances (accounts to be specified)	
Premiums (accounts to be specified)		Expenses of management :—	
Interests, dividends and rents	RS.	Commission	
Less income-tax thereon ...		Other expenses (to be specified) ...	
		Losses (accounts to be specified) ...	
Profits (accounts to be specified) ...		Other payments (accounts to be specified)	
Other receipts (to be specified) ...		Amount of funds at the end of the year as per balance-sheet. ...	
	RS.		RS.

NOTE 1.—All the items in the above account to be exclusive of life assurance and annuity transactions.

NOTE 2.—Items in this account to be net amounts after deduction of the amounts paid and received in respect of reassurances of the company's risks.

(D)—Statement to be submitted along with the Revenue Account by all life assurance companies.

Class of policy.	Total new life assurances completed in India during the year 19			Portion thereof reassured.		
	Sum assured.	Annual premium.	Single premium.	Sum assured.	Annual premium.	Single premium.
	RS.	RS.	RS.	RS.	RS.	RS.
Whole life ...						
Whole life by limited payments ...						
Endowment assurances ...						
Pure endowments ...						
Term assurances ...						
Other classes ...						
Total...						

State also :—

New annuities (state number and annual amount).

Total sums assured and bonuses (less reassurances) remaining in force at end of year 19 on lives of residents in India.

Number and amount of annuities (less reassurances) remaining in force at end of year 19 on lives of residents in India.

Largest sum for which the company has granted an assurance on any one life during the year, after deduction of any portion reassured.

Statement of the total investments in India of the life assurance and annuity funds.

THE SECOND SCHEDULE.

(See section 7.)

PROFIT AND LOSS ACCOUNT OF THE—FOR THE YEAR ENDING—19 .

	RS.		RS.
Balance of last year's account ...		Dividends and bonuses to shareholders payable on 19 , for the year ending 19 ...	
Interest and dividends not carried to other accounts ...		Expenses not charged to other accounts ...	
Less income-tax thereon.		Loss realised (accounts to be specified) ...	
Profit realized (accounts to be specified) ...		Other payments (accounts to be specified) ...	
Other receipts (accounts to be specified) ...		Balance as per Third Schedule ...	
RS. ...		RS. ...	

THE THIRD SCHEDULE.

(See section 7.)

(4)—BALANCE-SHEET OF THE 19

Liabilities.		Assets.	
RS.	RS.		RS.
Life assurance fund—		Assets of life assurance fund as per separate balance-sheet (if any).	
Outstanding liabilities of life assurance fund.		Assets of annuity fund as per separate balance-sheet (if any).	
		Assets of funds other than those shown in the above-mentioned balance-sheets.	
Annuity fund (if any) as per separate balance-sheet.		Mortgages on property within India ...	
		Do. do. out of India ...	
Outstanding liabilities of annuity fund.		Loans on public rates ...	
		Do. life interests and reversions ...	
		Do. stocks and shares ...	
		Do. company's policies within their surrender values.	
		Do. Personal security ...	
		Investments—	
Shareholders' capital paid up (if any).		Deposit with the Comptroller General (securities to be specified).	
Profit and loss account (if any).		Indian Government securities ...	
		British and Colonial Government securities ...	
Funds contained in General Revenue Account (if any) [Schedule 1 (c).]		Foreign Government securities ...	
		Indian Municipal and Provincial securities ...	
		British and Colonial do. do. ...	
		Foreign do. do. ...	
		Bonds, debentures, stocks and other securities whereon interest is guaranteed by the Indian Government.	
Other sums owing by the Company.		Bonds, debentures, stocks and other securities whereon interest is guaranteed by the British or any Colonial Government.	
(Accounts to be specified and stated separately under each class of business).		Bonds, debentures, stocks and other securities whereon interest is guaranteed by any Foreign Government.	
		Ordinary stocks and shares of any Indian Presidency Bank.	
		Debentures of any Railway in India ...	
		Debentures of any Railway out of India ...	
		Preference or guaranteed shares of any Railway in India.	
		Preference or guaranteed shares of any Railway out of India.	
		Ordinary stocks and shares of any Railway in India.	
		Ordinary stocks and shares of any Railway out of India.	
		House property in India ...	
		House property out of India ...	
		Freehold and leasehold ground rents and rent charges in India.	

Liabilities.		Assets.	
RS.	RS.		Rs.
		Life interests and reversions in India.	
		Do. do. out of India ...	
		Other investments in India (to be specified) ...	
		Other investments out of India (to be specified) ...	
		Agents' balances ...	
		Outstanding premiums * ...	
		Do. interests, dividends and rents * ...	
		Interest accrued but not payable * ...	
		Bills receivable ...	
		Cash—	
		On deposit ...	
		In hand and on current account ...	
		Other assets (to be specified) ...	
Rs. ...			Rs. ...

* These items are or have been included in the corresponding items in the First Schedule.

NOTE 1.—When part of the assets of the company are specifically deposited under local laws, in various places out of India, as security to holders of life assurance policies there issued, each such place and the amount compulsorily lodged therein must be specified.

NOTE 2.—The balance-sheet must state how the values of the Stock Exchange securities are arrived at, and on the occasions when a statement respecting valuation under the Fourth Schedule is made, a certificate must be appended, signed by the same persons as signed the balance-sheet, to the effect that in their belief the assets set forth in the balance-sheet are in the aggregate fully of the value stated therein, less any investment reserve fund taken into account.

NOTE 3.—Companies having investments with any uncalled liability shall state separately the full amount thereof.

NOTE 4.—Particulars must be given of all loans, including temporary advances, except loans on policies within their surrender values, made at any time during the year to any director or officer of a company or to any other company in which any of the said directors or officers may hold the position either of director or of officer.

(B)—BALANCE-SHEET OF THE LIFE ASSURANCE FUND ON
THE 19 TO BE COMPLETED BY COMPANIES
DOING BUSINESS OTHER THAN LIFE ASSURANCE FOR WHICH THEY
HAVE SEPARATE FUNDS.

Liabilities.		Assets.	
	RS.		RS.
Life assurance fund ...		Mortgages on property within India ...	
Claims admitted or intimated * but not paid ...		Do. do. out of India ...	
Other sums owing by the com- pany * (under this class of business) ...		Loans on public rates ...	
		Do. life interests and reversions ...	
		Do. stocks and shares ...	
		Do. company's policies within their surrender values. *	
		Do. personal security ...	
		Investments—	
		Deposit with the Comptroller-General (securities to be specified).	
		Indian Government securities ...	
		British and Colonial Government securi- ties ...	
		Foreign Government securities ...	
		Indian Municipal and Provincial securi- ties ...	
		British and Colonial do. do. ...	
		Foreign do. do. ...	
		Bonds, debentures, stocks and other securities whereon interest is guaran- teed by the Indian Government.	
		Bonds, debentures, stocks and other securities whereon interest is guaran- teed by the British or any Colonial Government.	
		Bonds, debentures, stocks and other securities whereon interest is guaran- teed by any Foreign Government.	
		Ordinary stocks and shares of any Indian Presidency Bank.	
		Debentures of any Railway in India ...	
		Debentures of any Railway out of India ...	
		Preference or guaranteed shares of any Railway in India.	
		Preference or guaranteed shares of any Railway out of India ...	
		Ordinary stocks and shares of any Rail- way in India.	
		Ordinary stocks and shares of any Rail- way out of India.	
		House property in India ...	
		Do. out of India ...	
		Freehold and leasehold ground rents and rent-charges in India ...	

* These items are or have been included in the corresponding items in the First Schedule.

Liabilities.	—	Assets.	—
	RS.		Rs.
		Life interests and reversions in India ...	
		Do. do. out of India ...	
		Other investments in India (to be specified)... ...	
		Do. out of India (to be specified)	
		Agents' balances	
		Outstanding premiums*	
		Do. interests, dividends and rents*	
		Interest accrued but not payable*	
		Bills receivable	
		Cash—	
		On deposit	
		In hand and on current account	
		Other assets (to be specified)	
	Rs.		Rs.

* These items are or have been included in the corresponding items in the First Schedule.

NOTE 1.—When part of the assets of the company are specifically deposited under local laws in various places, out of India, as security to holders of life assurance policies there issued, each such place and the amount compulsorily lodged therein must be specified.

NOTE 2.—A balance-sheet in the above form must be rendered in respect of the annuity fund if the investments of that fund are distinct from those of the life assurance fund.

NOTE 3.—The balance-sheet must state how the values of the Stock Exchange securities are arrived at, and on the occasions when a statement respecting valuation under the Fourth Schedule is made, a certificate must be appended, signed by the same persons as signed the balance-sheet, to the effect that in their belief the assets set forth in the balance-sheet are in the aggregate fully of the value stated therein, less any investment reserve fund taken into account.

NOTE 4.—A certificate must be appended hereto, signed by the same persons as signed the balance-sheet (Form A), and by the auditor, to the effect that no part of any such fund has been applied, directly or indirectly, for any purpose other than the class of business to which it is applicable.

NOTE 5.—Companies having investments with any uncalled liability shall state separately the full amount thereof.

NOTE 6.—Particulars must be given of all loans, including temporary advances, except loans on policies within their surrender values, made at any time during the year to any director or officer of a company, or to any other company in which any of the said directors or officers may hold the position either of director or of officer.

THE FOURTH SCHEDULE.

(See sections 8 and 9.)

STATEMENT RESPECTING THE VALUATION OF THE LIABILITIES UNDER LIFE POLICIES AND ANNUITIES OF THE———, TO BE MADE AND SIGNED BY THE ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions.)

1. The date up to which the valuation is made.
2. The general principles adopted in the valuation, and the method followed in the valuation of particular classes of assurances, including a statement of the method by which the net premiums have been arrived at, and whether these principles were determined by the instrument constituting the company or by its regulations or bye-laws, or how otherwise; together with a statement of the manner in which policies on under average lives are dealt with.
3. The table or tables of mortality used in the valuation. In cases where the tables employed are not published, specimen policy values are to be given, at the rate of interest employed in the valuation, in respect of whole-life assurance policies effected at the respective ages of 20, 30, 40 and 50, and having been respectively in force for 5 years, 10 years, and upwards at intervals of five years, respectively; with similar specimen policy values in respect of endowment assurance policies according to age at entry, original term of policy and duration.
4. The rate or rates of interest assumed in the calculations.
5. The actual proportion of the annual premium income (if any), reserved as a provision for future expenses and profits, separately specified in respect of assurances with immediate profits, with deferred profits, and without profits. (If none, state how this provision is made.)
6. The consolidated revenue-account since the last valuation, or, in case of a company which has made no valuation, since the commencement of the business. (This return should be made in the form annexed. No return under this heading will be required where a statement under this schedule is deposited annually).
7. The liabilities of the company under life policies and annuities at the date of the valuation, showing the number of policies, the amount assured and the amount of premiums payable annually under each class of policies, both with and without participation in profits; and also the net liabilities and assets of the company with the amount of surplus or deficiency. (These returns to be made in the forms annexed.)
8. The principles upon which the distribution of profits among the share-holders and policy-holders is made, and whether these principles were determined by the instrument constituting the company or by its regulations or bye-laws, or how otherwise, and the number of years' premiums to be paid before a bonus (*a*) is allotted, and (*b*) vests.

9. The results of the valuation, showing—

(1) the total amount of profit made by the company, allocated as follows :—

- (a) among the policy-holders with immediate participation, and the number and amount of the policies which participated ;
- (b) among policy-holders with deferred participation, and the number and amount of the policies which participated ;
- (c) among the shareholders ;
- (d) to reserve funds, or other accounts ;
- (e) carried forward unappropriated ;

(2) specimens of bonuses allotted to whole life assurance policies for Rs. 1,000 effected at the respective ages of 20, 30, 40 and 50, and having been respectively in force for 5 years, 10 years, and upwards at intervals of 5 years respectively, together with the amounts apportioned under the various modes in which the bonus might be received ; with similar specimen bonuses and particulars in respect of endowment assurance policies, according to age at entry, original term of policy, and duration.

(FORM REFERRED TO UNDER HEADING NO. 6 IN FOURTH SCHEDULE.)

*Consolidated Revenue Account of the ———— for ———— years
commencing ———— and ending ————.*

Amount of life assurance fund at the beginning of the period.	RS.	Claims under policies paid and outstanding :—	RS.
Premiums		By death	RS.
Consideration of annuities granted		By maturity	
Interest, dividends and rents, Less income-tax thereon	RS.	Surrenders	
Other receipts (accounts to be specified)		Annuities	
		Bonuses in cash	
		Do. reduction of premiums.	
		Commission	
		Expenses of management	
		Other payments (accounts to be specified).	
		Amount of life assurance fund at the end of the period as per Third Schedule.	
Rs.	Rs.

NOTE.—If any sum has been deducted from the expenses of management account and taken credit for in the balance-sheet as an asset, the sum so deducted to be separately shown in the above statement.

(FORM REFERRED TO UNDER HEADING NO. 7 IN FOURTH SCHEDULE.)
Summary and valuation of the policies of the ——— *as at* ——— 19

	Particulars of the policies for valuation.				Valuation.			
	Number of policies.	Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums.	Value by the Table, interest per cent.			
					Sums assured and bonuses.	Office yearly premiums.	Net yearly premiums.	Net liability.
ASSURANCES.								
I.—With immediate participation in profits.								
For whole term of life								
Other classes (to be specified).								
Extra premiums payable								
II.—With deferred participation in profits.								
For whole term of life								
Other classes (to be specified).								
Extra premiums payable								
Total assurances with profits...								
III.—Without participation in profits.								
For whole term of life								
Other classes (to be specified).								
Extra premiums								
Total assurances without profits.								
Total assurances								
Deduct re-assurances (to be specified according to class in a separate statement).								
Net amount of assurances								
Adjustments, if any (to be separately specified).								
ANNUITIES ON LIVES.								
Immediate								
Other classes (to be specified).								
Total of the results								

NOTE 1.—The term "extra premium" in this Act shall be taken to mean the charge for any risk not provided for in the minimum contract premium. If policies are issued in or for any country at rates of premium deduced from tables other than the European mortality tables adopted by the company, separate schedules similar in form to the above must be furnished.

NOTE 2.—Separate returns and valuation results must be furnished in respect of classes of policies valued by different tables of mortality, or at different rates of interest, also for business at other than European rates.

NOTE 3.—In cases also where separate valuations of any portion of the business are required under local laws in places outside British India, a summary statement must be furnished in respect of the business so valued in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums and the total net liability on the basis as to mortality and interest adopted in each such place, with a statement as to such bases, respectively.

(FORM REFERRED TO UNDER HEADING NO. 7 IN FOURTH SCHEDULE.)

Valuation Balance-sheet of _____ as at _____ 19 .

DR.	Rs.	OR.	Rs.
To net liability under life assurance and annuity transactions (as per summary statement provided in Fourth Schedule).		By life assurance and annuity funds (as per Balance-sheet under Third Schedule).	
To surplus, if any	...	By deficiency, if any	...

THE FIFTH SCHEDULE.

(See section 10.)

STATEMENT OF THE LIFE ASSURANCE AND ANNUITY BUSINESS
OF THE _____ ON THE 19 , TO BE SIGNED BY THE ACTUARY.

(The answers should be numbered to accord with the numbers of the corresponding questions. Statements of re-assurances corresponding to the statements in respect of assurances are to be given throughout.) Separate statements are to be furnished in the replies to all the headings under this Schedule for business at other than European rates.

1. The published table or tables of premiums for assurances for the whole term of life and for endowment assurances which are in use at the date above-mentioned.

2. The total amount assured on lives for the whole term of life which are in existence at the date above-mentioned, distinguishing the portions assured with immediate profits, with deferred profits, and without profits, stating separately the total reversionary bonuses and specifying the sums assured for each year of life from the youngest to the oldest ages, the basis of division as to immediate and deferred profits being stated.

3. The amount of premiums receivable annually for each year of life, after deducting the abatements made by the application of bonuses in respect of the respective assurances mentioned under Heading No. 2, distinguishing ordinary from extra premiums. A separate statement is to be given of premiums payable for a limited number of years, classified according to the number of years' payments remaining to be made.

4. The total amount assured under endowment assurances, specifying sums assured and office premiums separately in respect of each year in which such assurances will mature for payment. The reversionary bonuses must also be separately specified, and the sums assured with immediate profits, with deferred profits, and without profits separately returned.

5. The total amount assured under classes of assurance business, other than assurances dealt with under questions 2 and 4, distinguishing

the sums assured under each class and stating separately the amount assured with immediate profits, with deferred profits, and without profits, and the total amount of reversionary bonuses.

6. The amount of premiums receivable annually in respect of each such special class of assurances mentioned under Heading No. 5 distinguishing ordinary from extra premiums.

7. The total amount of premiums which has been received from the commencement upon pure endowment policies which are in force at the date above-mentioned.

8. The total amount of immediate annuities on lives, distinguishing the amounts for each year of life, and distinguishing male and female lives.

9. The amount of all annuities on lives other than those specified under Heading No. 8, distinguishing the amount of annuities payable under each class, and the amount of premiums annually receivable.

10. The average rate of interest yielded by the assets, whether invested or uninvested, constituting the life assurance fund of the company, calculated upon the mean fund of each year during the period since the last investigation, without deduction of income-tax.

It must be stated whether or not the mean fund upon which the average rate of interest is calculated includes reversionary investments.

11. A table of minimum values if any, allowed for the surrender of policies for the whole term of life and for endowments and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of the application of such method to policies of different standing and taken out at various interval ages from the youngest to the oldest.

THE SIXTH SCHEDULE.

(See sections 24 and 25.)

RULES FOR VALUING ANNUITIES, LIFE POLICIES AND LIABILITIES.

Rule for valuing an annuity.

An annuity shall be valued according to the tables used by the company which granted such annuity at the time of granting the same, and, where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to such rate of interest and table of mortality as the Court may direct.

Rule for valuing a policy.

The value of the policy is to be the difference between the present value of the reversion in the sum assured according to the contingency upon which it is payable, including any bonus or addition thereto made before the commencement of the winding up, and the present value of the future annual premiums.

In calculating such present values interest is to be assumed at such rate, and the rate of mortality according to such tables, as the Court may direct.

The premium to be calculated is to be such premium as according to said rate of interest and rate of mortality is sufficient to provide for the risk incurred by the office in issuing the policy, exclusive of any addition thereto for office expenses and other charges.

Rule for valuing a liability.

The liquidator, in the case of all persons appearing by the books of the company to be entitled to or interested in policies granted by such company, is to ascertain the value of the liability of the company to each such person, and give notice of such value to such persons in such manner as the Court may direct, and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in manner and within a time to be prescribed by a rule or order of the Court.